REPORT
ON
DRUG AND ALCOHOL TESTING IN THE WORKPLACE

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY

1992

The Ontario Law Reform Commission was established by the Ontario Government in 1964 as an independent legal research institute. It was the first Law Reform Commission to be created in the Commonwealth. It recommends reform in statute law, common law, jurisprudence, judicial and quasi-judicial procedures, and in issues dealing with the administration of justice in Ontario.

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EXECUTIVE SUMMARY

In the *Report on Drug and Alcohol Testing in the Workplace*, the Ontario Law Reform Commission takes the position that it is time for the Ontario government to enact legislation that specifically addresses the issue of drug and alcohol testing in the workplace. Mandatory testing has become a highly contentious issue in Canada, both provincially and federally. Pressure to require testing is likely to increase, in large part because of the initiatives and policies which have been introduced in the United States.

As the Report illustrates, the current legal framework does not adequately deal with the complex problems posed by workplace testing. The Commission recommends that the legislation that is promulgated ought to apply to private and public sector employees, to unionized as well as non-unionized workers, and to job applicants and current employees. Statutory provisions specifically directed to workplace testing will substantially reduce the uncertainty which persists respecting the appropriateness of testing employees in this province. This in turn will reduce the costs associated with instituting human rights actions, labour arbitration grievances, constitutional challenges, and other legal actions.

The Commission proposes that the legislature should ban the testing of bodily samples of all current and prospective employees in Ontario. The Commission makes this recommendation for several reasons. First, drug and alcohol testing constitutes a significant invasion of the privacy interests of employees. Such testing reveals confidential information unrelated to legitimate employer concerns. Second, the techniques currently used to analyze the bodily fluids of employees are incapable of detecting impairment. Consequently, the relationship between a positive test result and job performance is highly tenuous. A third reason for the ban on bodily sample testing is that there is no empirical evidence to support the proposition that drug abuse has become a significant problem in the Ontario workforce.

The Ontario Law Reform Commission is of the view that alternate measures can be introduced by management that do not involve the complex legal and ethical dilemmas posed by drug and alcohol testing. Behavioural evaluation of the impairment of employees in conjunction with employee assistance programs constitute effective methods of detecting and rehabilitating workers who have substance abuse problems. In cases in which impairment on the job poses a risk of physical injury or death to the employee, to co-workers or to members of the public, performance testing of the employee is justified. Performance testing evaluates the psychomotor

skills of employees by means of mechanical aptitude tests and computer programs. The Commission endorses performance testing as it is the least intrusive, most effective method of measuring impairment. In addition, performance testing detects impairment from any source, not simply drugs or alcohol. An employee who would be a safety hazard on any given day because of illness, fatigue, or personal stress can be identified. Moreover, unlike bodily fluid testing, performance testing provides immediate feedback. By identifying impaired employees before they begin their work, accidents, injuries and errors can be prevented, and thus, the safety of the public and other workers is enhanced.

It is the view of the Commission that these recommendations recognize the legitimate interests of employers and the public in workplace safety and at the same time serve to protect the privacy and dignity of employees who earn their livelihood in Ontario.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

1. The provincial government should promulgate legislation relating to drug and alcohol testing in the workplace. The legislation should have application to private and public sector workers, to unionized and non-unionized employees and to job applicants.

2. A legislative ban should exist on drug and alcohol testing of bodily samples by employers of all current and prospective employees in Ontario.

3. In cases where impairment on the job poses a risk of physical injury or death to the employee, to co-workers, or to members of the public, performance testing of the employee is justified. Performance testing evaluates the psychomotor skills of employees by means of mechanical aptitude tests and computer programs. It is the most effective and least intrusive means of measuring impairment. The Commission is therefore of the view that even in the case of safety-sensitive positions, the taking of bodily samples is not justified.

RAPPORT

SUR

LE DÉPISTAGE DE L'INTOXICATION PAR LES DROGUES OU L'ALCOOL AU LIEU DE TRAVAIL

COMMISSION DE RÉFORME DU DROIT DE L'ONTARIO

SOMMAIRE

1992

La Commission de réforme du droit de l'Ontario a été constituée par le Gouvernement de l'Ontario en 1964 en tant qu'institut indépendant de recherche juridique. C'est la première Commission du genre au sein du Commonwealth. Elle a pour mandat de proposer des réformes dans les domaines suivants: droit statutaire, droit commun, jurisprudence, procédures judiciaires et quasi-judiciaires et autres questions touchant l'administration de la justice en Ontario.

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SOMMAIRE

Dans son Rapport sur le dépistage de l'intoxication par les drogues ou l'alcool au lieu de travail (Report on Drug and Alcohol Testing in the Workplace), la Commission de réforme du droit de l'Ontario estime que le moment est venu pour le gouvernement de la province d'adopter une loi qui porte expressément sur cette question. Le dépistage obligatoire est devenu un sujet très controversé au Canada, sur la scène fédérale comme dans les provinces. Il est à prévoir que les pressions s'accroîtront en vue du dépistage systématique, en grande partie à cause des initiatives prises et des politiques instaurées aux États-Unis.

Comme le fait ressortir le rapport, le cadre législatif actuel ne permet pas de résoudre les problèmes complexes que pose le dépistage au lieu de travail. La Commission recommande que la loi à promulguer s'applique aux employés des secteurs public et privé, qu'ils soient syndiqués ou non, aux personnes qui postulent un emploi de même qu'à celles qui ont déjà un poste. Des dispositions législatives portant expressément sur le dépistage au lieu de travail réduiraient considérablement l'incertitude qui caractérise encore la question de savoir s'il convient de soumettre au dépistage les employés dans cette province. La certitude en la matière réduira à son tour les coûts occasionnés par les actions en violation des droits de la personne, l'arbitrage des griefs, les causes constitutionnelles et autres.

La Commission propose que l'Assemblée législative interdise le dépistage par analyse des prélèvements à l'égard de tous les employés en poste et de tous ceux qui postulent un emploi en Ontario. Cette recommandation s'explique par plusieurs raisons. En premier lieu, le dépistage de l'intoxication par les drogues ou l'alcool constitue une grave atteinte au droit à la vie privée des employés. L'analyse chimique peut révéler des détails confidentiels qui n'ont rien à voir avec les préoccupations légitimes de l'employeur. En second lieu, les techniques actuellement utilisées pour analyser les liquides organiques des employés ne permettent pas de conclure à un affaiblissement des facultés. En conséquence, il n'y a qu'un rapport ténu entre des résultats d'analyse positifs et l'aptitude réelle. Une troisième raison qui justifie l'interdiction de l'analyse des prélèvements est que dans les faits, rien ne prouve que la toxicomanie est devenue un problème grave chez les travailleurs en Ontario.

La Commission de réforme du droit de l'Ontario estime que les autorités responsables peuvent prendre d'autres mesures qui ne mettent pas en jeu les difficiles dilemmes juridiques et moraux posés par le dépistage de

l'intoxication par les drogues et l'alcool. La détection des facultés affaiblies par les tests de comportement ainsi que les programmes d'aide aux employés constituent une méthode efficace de dépistage et de réadaptation des travailleurs qui souffrent d'alcoolisme ou de toxicomanie. Dans les cas où des facultés affaiblies représentent un risque de blessures corporelles ou de mort pour l'intéressé, pour ses collègues ou pour le public, les tests d'aptitude sont justifiés. Ces tests évaluent la psychomotricité de l'employé au moyen de tests de coordination et de programmes d'ordinateur. Selon la Commission, les tests d'aptitude constituent la méthode la moins envahissante et la plus efficace de détection des facultés affaiblies. En outre, elle permet de détecter cet état d'affaiblissement quelle qu'en soit la source, non seulement les drogues ou l'alcool. Tout employé qui, à un moment donné, représente un risque de sécurité pour cause de maladie, de fatigue, ou de tension personnelle, pourra être identifié par cette méthode. En outre, à l'opposé de l'analyse de liquides organiques, les tests d'aptitude assurent une rétroaction immédiate. En identifiant les employés dont les facultés sont affaiblies avant qu'ils ne se mettent au travail, on peut prévenir les accidents, les blessures et les erreurs, ce qui assure la sécurité du public et des autres travailleurs.

La Commission estime que ces recommandations prennent en considération l'intérêt légitime des employeurs et du public pour la sécurité au lieu de travail, en même temps qu'elles protègent la vie privée et la dignité des employés qui gagnent leur vie en Ontario.

SOMMAIRE DES RECOMMANDATIONS

La Commission fait les recommandations suivantes:

1. Le gouvernement provincial devra promulguer une loi qui vise le dépistage de l'intoxication par les drogues et l'alcool au lieu de travail. Cette loi s'appliquera aux employés des secteurs public et privé, qu'ils soient syndiqués ou non, ainsi qu'aux personnes qui postulent un emploi.

2. La loi interdira le dépistage de l'intoxication par les drogues et l'alcool par analyse, par les employeurs, des prélèvements des employés en poste et de ceux qui postulent un emploi en Ontario.

3. Dans les cas où l'affaiblissement des facultés de l'intéressé au travail est un risque de mort ou de blessure pour lui-même, pour ses collègues ou pour le public, l'évaluation de son aptitude est justifiée. Les tests d'aptitude évaluent la psychomotricité de l'employé au moyen de tests de coordination et de programmes d'ordinateur. Il s'agit là de la méthode la plus efficace et la moins envahissante de détection des facultés affaiblies. La Commission estime en conséquence que même à l'égard des postes où la sécurité est un facteur primordial, les analyses des prélèvements ne sont pas justifiées.

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Ontario
Law Reform
Commission

To The Honourable Howard Hampton
Attorney General for Ontario

Dear Attorney:

We have the honour to submit our *Report on Drug and Alcohol Testing in the Workplace.*

Richard E.B. Simeon
Acting Chair

Earl A. Cherniak
Commissioner

John D. McCamus
Commissioner

Margaret A. Ross
Commissioner

September 9, 1992

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PREFACE

The Commission's *Report on Drug and Alcohol Testing in the Workplace* constitutes the second Report in a series of projects directed to testing issues. Ronda Bessner, Counsel at the Commission, was responsible for the preparation of this Report.

An Advisory Board was established by the Commission, composed of individuals from various disciplines and organizations. The Commission would like to express its deep appreciation to the members of the Board: Stephen Boal, Addiction Research Foundation; Scott Bromm, Policy Advisor, Ministry of Labour; Barbara Butler, President, Barb Butler & Associates; Brad Cowls, Transportation Officer, Motor Carrier Policy Office, Ministry of Transportation; Ron Dickson, CAW Canada; Catherine Gilbert, Canadian Civil Liberties Association; Jeremy Hill, Legal Department, Transport Canada; Nicole Kennedy, Canadian Human Rights Commission; Kathy Laird, Ontario Human Rights Commission; Jim Lawson, Assistant General Manager, Human Resources Division, Toronto-Dominion Bank; Dr. Bhushan Kapur, Addiction Research Foundation; Scott MacDonald, Addiction Research Foundation; Eugene Oscapella, The Privacy Commissioner of Canada; Michel Picher, Adjudication Services Limited; Howard Moyer, Human Resources Department, Imperial Oil Limited; Tracey Tremayne-Lloyd from the law firm of Goodman and Carr; and Linda Wilcott, Research & Program Development, Canadian Labour Congress. In addition, the Commission advertised for submissions. The Commission would like to thank the organizations and individuals who responded to the issues discussed in the advertisements.

The Commission would like to express its appreciation to Judith Bellis, formerly a Commission Counsel, who initially had carriage of this project and Adelle Blackett, a student at the Commission. In addition, we would like to thank Marc Gold and Alan Young as well as Harish Jain and S. Muthuchidambaram for the research papers which they prepared for the Commission. Finally, we would like to acknowledge the work of Cora Calixterio, a secretary at the Commission, who typed the manuscript.

CHAPTER 1

INTRODUCTION

Drug and alcohol testing in the workplace, an issue that emerged in the mid-1980s,[1] deserves immediate attention by the legislators of Ontario. Since 1986, the number of Canadian companies which have instituted mandatory drug and alcohol testing has significantly increased in both the private and public sectors. Air Canada, Imperial Oil, the Ontario Racing Commission, the Toronto-Dominion Bank, Canadian National Railway, Canadian Pacific, and American Motors (Canada), are some of the employers who have introduced testing programs in their respective workplaces.[2] In addition, Transport Canada has proposed legislation which would require employees in the air, rail, shipping and trucking industries to submit to drug and alcohol testing.[3]

Mandatory testing of employees for drugs and alcohol became a public issue in Canada largely as a result of the policies and initiatives introduced by the United States government.[4] In September 1986, President Reagan issued an Executive Order requiring all federal agencies to establish

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1 A.E. Robinson, "Drug Use Testing: The Canadian Scene" (1989), 34 J. Forensic Sci. 1422; and E.M. Chen, P.T. Kim and J.M. True, "Common Law Privacy: A Limit on an Employer's Power to Test for Drugs" (1990), 12 Geo. Mason U.L. Rev. 651.

2 Robinson, *supra*, note 1, at 1424; *Report of the Canadian Bar Association - Ontario, Committee to Study the Implications of Mandatory Drug Testing in the Workplace* (July 1987), at 7 (hereinafter referred to as "Canadian Bar Association"); B. Marotte, "Drug tests enter Canadian workplace", *The Toronto Star* (October 21, 1991) D1; K. Cox, "Mandatory drug tests irk crews", *The Globe and Mail*, Toronto (May 6, 1992) A1; J. Armstrong, "Rights agency probes firm's drug testing", *The Toronto Star* (January 9, 1992) A4; J. Armstrong, "Oil company under attack over latest drug policy", *The Toronto Star* (January 17, 1992) F7; M. Gibb-Clark, "T-D to test workers for drug use", *The Globe and Mail*, Toronto (September 22, 1990) B3; and A.A. Borovoy, "Stop Random Drug Tests", *Ottawa Citizen* (March 22, 1992) B-1.

3 S. Chapnik, "Mandatory Drug Testing In The Workplace" (1989), 5 Admin. L.J. 102, at 102; and E. Gershkovitch and S. Sutherland, "Drug testing a threat to freedom?", *The Globe and Mail*, Toronto (April 5, 1990) A7.

4 Robinson, *supra*, note 1, at 1422; B. Feldthusen, "Urinalysis Drug Testing: Just Say No" (1988), 5 Can. Hum. Rts. Y.B. 81, at 93; and T. Tremayne-Lloyd, "Drug and Alcohol Abuse in the Workplace – Transport Canada's Response" (1991), 8 Bus. & L. 20.

compulsory drug testing for current and prospective employees.[5] Both the United States Department of Transportation and the Federal Railroad Administration responded to this mandate by introducing mandatory testing, including random testing of employees in specified circumstances.[6] By 1989, testing programs had been established by more than forty federal agencies.[7] It is noteworthy that the Executive Order and the programs that were implemented as a result of the Order were concerned exclusively with the use of illegal drugs.[8] In other words, testing for licit drugs or alcohol in the workplace did not form any part of these programs.

In 1988, the *Drug-Free Workplace Act*[9] was passed by the United States Congress. This federal statute compelled all employers contracting with the United States government for the procurement of any property or services worth more than $25,000 and all recipients of federal grants, to certify with the contracting federal agency that they would provide a drug-free workplace.[10]

The "War on Drugs" initiated by President Reagan was not solely confined to the public sector and to private sector employers who had contracts with the federal government. Screening employees for illicit drug use rapidly spread to other parts of the workforce. By 1987, approximately fifty percent of the largest American corporations performed testing on their employees.[11] As Denenberg states, in the United States "[t]he growing corporate trend is to require job applicants and employees to submit to urinalysis, blood assays, or breathalyzer tests".[12]

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5 S.J. Wisotsky, "The Ideology of Drug Testing" (1987), 11 Nova L. Rev. 763; Chapnik, *supra*, note 3, at 103; and Canadian Bar Association, *supra*, note 2, at 7.

6 C.G. Paliare and B.W. Burkett, *Mandatory Testing and Other Responses to Drugs and Aids in the Workplace* (1988) (paper prepared for the Canadian Bar Association - Ontario), at 21; "Workplace Drug Testing and the National Institute on Drug Abuse: An Interview with J. Michael Walsh" (1990), 12 Geo. Mason L. Rev. 475; Chapnik, *supra*, note 3, at 103; and Canadian Bar Association, *supra*, note 2, at 7.

7 K. Van Rensburg, "Mandatory Drug and Alcohol Testing" (1989), 6 Bus. & L. 9, at 9.

8 Wisotsky, *supra*, note 5, at 768.

9 41 U.S.C. §§701-707 (1988).

10 J.R. Mooney and D.L. Neigus, "The Problems of Drug Testing in the Private Workplace" (1991), 37 Prac. Law. 57, at 59.

11 Van Rensburg, *supra*, note 7, at 9. See, also, E.J. Imwinkelried, "The Debate Over Drug Testing in the Workplace: A Novel Opportunity for Public Scientific Education" (1991), 9 Behavioral Sci. & L. 305, at 306.

12 A.E. Denenberg, "Corporate Drug Testing: Private Employers' Right to Test" (1987), 12 Del. J. Corp. L. 951, at 964.

Influenced by President Reagan's Executive Order, Prime Minister Mulroney announced a National Drug Strategy in 1987.[13] An all-party Committee of the House of Commons was established. Its report recommended that legislation be promulgated by the federal government in order to delineate the circumstances in which mandatory testing of employees in the private and public sectors would be permitted. It was the Committee's view that mass or random drug testing ought to be prohibited.[14] To date, no statute that specifically addresses the issue of mandatory testing of employees for alcohol and drugs has been introduced by the federal government.

United States testing schemes without doubt have had a large impact in the Canadian workplace. American policy infiltrates Canada through United States Transportation regulations, as well as by the imposition by American parent companies of testing programs on their Canadian subsidiaries.[15] For example, the United States Department of Transportation Regulations, which require drug testing for the aviation, motor carrier, rail, marine and pipeline industries, will apply to Canadian companies operating in the United States.[16] Therefore, Canadian bus, trucking and other transportation companies which operate in the United States will be compelled to introduce testing programs in order to conduct business across the border.

It is argued that no empirical studies exist which demonstrate that drug abuse in the Canadian workforce is a significant problem.[17] In fact, the research that has been conducted indicates the contrary: drugs have not been found to be a major factor in workplace accidents. Rather, it is alcohol that

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[13] Robinson, *supra*, note 1, at 1424; Chapnik, *supra*, note 3, at 103; and Canadian Bar Association, *supra*, note 2, at 7.

[14] Canada, House of Commons, *Booze, Pills & Dope[:] Reducing Substance Abuse in Canada* (report of the Standing Committee on Health and Welfare) (Ottawa: October 1987).

[15] Tremayne-Lloyd, *supra*, note 4.

[16] Chapnik, *supra*, note 3, at 102.

[17] Canadian Bar Association, *supra*, note 2, at 9; and Chapnik, *supra*, note 3, at 103. According to B.H. Cunningham, Senior Program Consultant at the Addiction Research Foundation, alcohol and drug use in Ontario peaked in the late 1970s and has been stable or in decline since then: see Cunningham, "Substance Abuse – The Hidden Brain Drain", presentation on substance abuse in the workplace at Insight Seminar on *Drugs and Alcohol in the Workplace[:] Creating and Implementing Effective Corporate Policy* (Toronto: May 28, 1992). Note that the President's Executive Order did not respond to any comprehensive empirical study of the federal workforce regarding safety, unreliability, absenteeism and the like. See Wisotsky, *supra*, note 5, at 766; and Gershkovitch and Sutherland, *supra*, note 3.

is the source of North America's largest substance abuse problem.[18] According to a study of the Addiction Research Foundation, ten percent of employees are excessive alcohol drinkers. By contrast, heavy drug users represent less than one percent of the employees in the workforce.[19]

United States studies confirm that there are more alcohol-related accidents than accidents caused by all illegal substances combined.[20] It is for this reason that the mandatory testing programs introduced in the United States, many of which test solely for illicit drug use, have been severely criticized.[21] As these observers state, "alcohol abuse presents a far more substantial and pervasive problem in the workplace than does the use of illicit drugs, yet few employers test for alcohol even though the technology is available".[22] The tendency to minimize the effects of alcohol is often attributed to the legality and social acceptance of alcohol.[23]

What are the purported justifications for introducing testing programs into the workforce? The primary rationale for instituting drug and alcohol testing is to promote safety in the workplace. It is argued that public safety is enhanced in circumstances in which employees are compelled to submit to tests that detect either actual impairment or the risk of impairment.[24] Proponents of testing contend that analyzing the bodily fluids, namely, the urine or blood, of airline pilots, truck drivers, railroad engineers and nuclear

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[18] B. Beyerstein, M. Jackson and D. Beyerstein, *Drug Testing in the Workplace* (1989) (position paper of the British Columbia Civil Liberties Association), at 21; A.J. McBay, "Efficient Drug Testing: Addressing the Basic Issues" (1987), 11 Nova L. Rev. 647, at 651; British Columbia, Ministry of Health and Workers' Compensation Board, *Report of the British Columbia Task Force on Alcohol and Drug Abuse in the Workplace* (1987), at 23; L.M. Tennassee, *A Perspective on Drug Testing in the Workplace* (Banff, Alta.: 1988) (presented at national conference), at 2; M. Wight, "State Drug Testing Statutes: Legislative Attempts to Balance Privacy and Productivity" (1989), 14 J. Corp. L. 721, at 724; Wisotsky, *supra*, note 5, at 764; and Canadian Bar Association, *supra*, note 2, at 10.

[19] Addiction Research Foundation, *Workplace Drug and Alcohol Testing: Where to Draw the Line* (Toronto: February 1991).

[20] M.A. Rothstein, "Screening Workers for Drugs: A Legal and Ethical Framework" (1985-86), 11 Empl. Rel. L.J. 422, at 423; K.W. Yeam, "Involuntary Random Post-Employment Drug Testing in the Public and Private Sectors" (1986), 20 Beverley Hills B.J. 168, at 170; Wisotsky, *supra*, note 5, at 768; Chen, Kim and True, *supra*, note 1, at 681; G. Bermant, "Drug Testing in the Workplace: Status and Prospects[:] Introduction" (1990), 12 Geo. Mason U.L. Rev. 469, at 470; and T.A. Halbert, "'Coming Up Dirty': Drug Testing at the Work Place" (1987), 32 Villanova L. Rev. 691, at 713.

[21] Wisotsky, *supra*, note 5, at 768; and Bermant, *supra*, note 20, at 470.

[22] Chen, Kim and True, *supra*, note 1, at 681.

[23] Rothstein, *supra*, note 20, at 423; Tennassee, *supra*, note 18, at 2; J.T. Wrich, "Beyond Testing: Coping with Drugs at Work" (1988), 1 Harv. Bus. Rev. 120, at 120.

[24] A. Sanders, "Intoxication and the Law: Drug Testing in the Workplace", [1987] Ann. Surv. Am. L. 167, at 192.

plant operators, will significantly reduce the occurrence of major accidents to members of the public.

Testing has also been justified on the ground that it promotes the personal safety of co-workers who may be injured as a result of the acts of an impaired employee.[25] Failure on the part of an employer to address a worker's substance abuse problem may violate certain legal duties owed by an employer to her employees. For example, the *Occupational Health and Safety Act*[26] stipulates that employers have a duty to provide a safe working environment. Furthermore, employers argue that to forego testing exposes them to liability to members of the public who may be injured as a result of the acts of an impaired employee. Employers may be vicariously liable in personal injury actions or in defective product suits for the conduct of employees who perform their work under the influence of drugs or alcohol.[27]

Alcohol and drug testing has also been embraced as a means of enhancing labour productivity. It is asserted that employees who have substance abuse problems have higher rates of absenteeism, are likely to be tardy for work and quickly deplete their sick leave benefits.[28] It is argued that mandatory testing would have the effect of substantially reducing an employer's contributions to workers' compensation funds and health insurance plans.[29]

Advocates of testing assert that workplace security is enhanced by the introduction of testing programs: it decreases the likelihood that employees will engage in illegal activities, such as theft, in order to support expensive drug habits.[30] It is also stated that testing discourages employees from engaging in the criminal acts of selling or using illegal drugs.[31] Another virtue of drug and alcohol testing in the workplace, assert proponents of

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25 Denenberg, *supra*, note 12, at 969.

26 R.S.O. 1990, c. O.1., s. 25. See, also, Feldthusen, *supra*, note 4, at 88.

27 Feldthusen, *supra*, note 4, at 88; E.S. Kaplan, J.B. Langevin and R.A. Ross, "Drug and Alcohol Testing in the Workplace: The Employer's Perspective" (1988), 14 Wm. Mitchell L. Rev. 365, at 384; and Van Rensburg, *supra*, note 7, at 9.

28 S.S. Cairns and C.V. Grady, "Drug Testing in the Workplace: A Reasoned Approach for Private Employers" (1990), 12 Geo. Mason U.L. Rev. 491, at 543; W.S. Armington, "Urinalysis Drug Testing of Private Employees: A Call for Legislation in Pennsylvania" (1987), 91 Dick. L. Rev. 1015, at 1018; and Denenberg, *supra*, note 12, at 965.

29 Denenberg, *ibid.*; and G. Lafontaine, "Not a Civil Liberties Paper: Mandatory Drug Testing in a Political and Historical Context" (1989), 9 Windsor Y.B. Access Just. 63, at 69.

30 Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: 1990), at 6.

31 *Ibid.*

mandatory testing, is that it fosters public trust in the companies that have introduced such programs.[32]

What are the arguments of those who oppose workplace testing? A major reason articulated by those individuals and organizations who advocate a legislative ban on testing is that testing the bodily fluids of an employee for the presence of drugs or alcohol constitutes an unwarranted invasion of the privacy of the individual.[33] Subjecting a person to a test, it is argued, may be physically intrusive, demeaning and embarrassing. In addition, standard drug testing samples contain a wealth of extraneous information about an employee's life. Analysis of blood and urine samples may reveal numerous physiological facts about the tested individual, such as whether the employee is pregnant, has diabetes, is HIV infected or suffers from depression.[34] In addition to the invasiveness of these procedures, there is a fear that the procurement of this confidential information by management will result in discrimination against employees who have these conditions. There is a serious concern that such information could lead to "employer manipulation, sabotage or abuse unrelated to legitimate employer concerns".[35]

Opponents of testing are also highly critical of the testing procedures, as well as the technology currently available to determine whether a person has a substance abuse problem. First, it is asserted that some of the testing techniques, in particular urinalysis, have a high rate of false positive results.[36] Employer reliance on false positive results may have devastating consequences for employees including disciplinary measures, compulsory rehabilitation or termination of employment.[37] Moreover, disclosure of

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[32] R.S. Schottenfeld, "Drug and Alcohol Testing in the Workplace – Objectives, Pitfalls, and Guidelines" (1989), 15 Am. J. Drug Alcohol Abuse 413, at 415.

[33] Canadian Civil Liberties Association, submission to R. MacKenzie, Minister of Labour for Ontario, on Mandatory Drug Testing in the Workplace (February 21, 1992); Canadian Bar Association, *supra*, note 2, at 29; Privacy Commissioner of Canada, *supra*, note 30, at 15; Ontario Federation of Labour, submission to R. MacKenzie, Minister of Labour for Ontario and G. Pouliot, Minister of Transportation for Ontario on the Prohibition of Employment-Related Drug and Alcohol Testing (July 7, 1992); M.R. O'Donnell, "Employee Drug Testing – Balancing the Interests in the Workplace: A Reasonable Suspicion Standard" (1988), 74 Va. L. Rev. 969, at 972; Chen, Kim and True, *supra*, note 1, at 691; Armington, *supra*, note 28, at 1018-19; and Schottenfeld, *supra*, note 32, at 416.

[34] See authorities referred to in note 33, *supra*. See, also, Yeam, *supra*, note 20, at 170.

[35] Yeam, *ibid.*, at 170.

[36] See discussion in ch. 2 of this Report.

[37] Sanders, *supra*, note 24, at 186, 193; Canadian Bar Association, *supra*, note 2, at 17, 29; Chapnik, *supra*, note 3, at 104; and D.C. Rosenkrantz, "A Summary of Massachusetts Law on the Right of Privacy in the Employment Relationship" (1986), 30 Boston B.J. 32, at 37.

inaccurate test results can irreparably damage an individual's reputation and can ruin her prospects for future employment.[38]

A second criticism of the testing techniques is that they are incapable of measuring present or even past impairment from drugs.[39] As Schottenfeld states in "Drug and Alcohol Testing in the Workplace – Objectives, Pitfalls, and Guidelines", "even an accurate positive test is not informative about the recency of use, whether the person tested was impaired at the time of testing or whether the person has substance abuse problems".[40] Critics argue that because the testing techniques cannot detect the impairment of an employee, the employer has no legitimate interest in subjecting his employees to such testing.[41] Moreover, it is stated that regulating the off-the-job conduct of an employee constitutes "an all-pervasive intrusion into the employee's private life".[42] Thus, it is asserted that testing has no functional value in screening out impaired workers and cannot serve the employer's interests in safety and productivity.[43] Furthermore, it is vociferously argued that the illegality of drugs is not a legitimate employer interest. Employers should not be in the law enforcement business and the investigation of unlawful activities should remain exclusively within the domain of the police.[44]

It is also contended that mandatory testing programs generate friction between labour and management. A view shared by many observers is that obliging employees to submit to tests will have a negative effect on the morale of the workforce.[45] Testing, which essentially compels an employee to establish his innocence against a presumption of guilt, causes "an air of

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38 Committee on Labor and Employment Law, "Drug Testing In The Workplace" (1988), 43 A.B.N.Y.C. Record 447, at 449; and Imwinkelried, *supra*, note 11, at 306.

39 Chapnik, *supra*, note 3, at 104; and H.J. Glasbeek and D. McRobert, "Privatizing Discipline – The Case of Mandatory Drug Testing" (1989), 9 Windsor Y.B. Access Just. 30, at 42.

40 *Supra*, note 32, at 418.

41 Wisotsky, *supra*, note 5, at 764.

42 Chapnik, *supra*, note 3, at 104; Rothstein, *supra*, note 20, at 424; and T.S. Denenberg and R.V. Denenberg, *Alcohol and Drugs: Issues in the Workplace* (2nd ed.) (Washington, D.C.: Bureau of National Affairs, Inc., March 6, 1990) (draft manuscript), ch. A, at 38. See, also, Paliare and Burkett, *supra*, note 6, at 14.

43 Chen, Kim and True, *supra*, note 1, at 690.

44 Committee on Labor and Employment Law, *supra*, note 38, at 450.

45 Halbert, *supra*, note 20, at 216; and K.B. Zeese, "Drug Hysteria Causing Use of Useless Urine Tests" (1987), 11 Nova L. Rev. 815, at 819-20.

suspicion, distrust and animosity to pervade the labour-management relationship".[46]

Many Canadian companies have established employee assistance programs in recent years to encourage workers to seek treatment for a variety of personal problems, including alcohol and drug abuse. A view widely expressed is that mandatory testing constitutes a threat to the viability of employee assistance programs.[47] As the Canadian Centre for Occupational Health and Safety has stated, employee assistance programs and mandatory drug and alcohol workplace testing are "mutually incompatible: 'one is based on trust and cooperative working relationships; the other is punitive and based on suspicion'".[48]

Opponents of testing the bodily fluids of employees assert that there are less invasive and more effective alternatives to the current testing techniques. For example, employee assistance programs are highly endorsed as they are built upon standards of "industrial jurisprudence" and because they safeguard employees' rights to privacy by using job performance to identify employees who are alcoholics or drug addicted.[49] As these American authors state:[50]

> Since 1960, employee assistance programs have been widely evaluated using different research populations and methods, and social scientists have consistently found them to be very effective, especially in dealing with alcohol problems. Consequently, they are a proven and potent alternative for combating the drug hysteria currently sweeping the American workplace.

In addition, motor coordination tests exist which are stated to be less invasive and more reliable than the testing techniques currently used in the workplace.[51]

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[46] L.E. Henriksson, "The Unconvincing Case for Drug Testing" (1991), 17 Can. Pub. Pol'y 183, at 189; and Chen, Kim and True, *supra*, note 1, at 673.

[47] Henriksson, *supra*, note 46, at 189; Chen, Kim and True, *supra*, note 1, at 690; and K.B. Zeese, "Drug Testing Here to Stay?" (1990), 12 Geo. Mason U.L. Rev. 545, at 550.

[48] Henriksson, *supra*, note 46, at 189, quoting Canadian Centre for Occupational Health and Safety, *Workshop on Drug Testing in the Workplace* (Hamilton, Ont.: 1987), at 45.

[49] W.J. Sonnenstuhl, H.M. Trice, W.J. Straudenmeir, Jr. and P. Steele, "Employee Assistance and Drug Testing: Fairness and Injustice in the Workplace" (1987), 11 Nova L. Rev. 709, at 728; Wrich, *supra*, note 23, at 124; Beyerstein, Jackson and Beyerstein, *supra*, note 18, at 16; and Feldthusen, *supra*, note 4, at 91.

[50] Sonnenstuhl, Trice, Straudenmeir, Jr. and Steele, *supra*, note 49, at 728.

[51] For a fuller discussion, see ch. 7 of this Report.

The growing reliance of employers on drug and alcohol testing has led to widespread debate respecting the legality and reliability of such testing.[52] Unlike in the United States, there is no legislation in Ontario or in Canada that specifically addresses the issue of mandatory testing in the workplace. A view commonly shared is that the general statutes which govern the workplace, as well as the common law, fail to provide adequate protection to an employee who is compelled to submit to a test.[53] It is argued that legislation is urgently needed to delineate the situations, if any, in which management is permitted to test its workforce. For example, uncertainty persists as to whether a company may test its workers on a random basis or whether or not an employer must have reasonable suspicion or probable cause to believe that an employee is under the influence of drugs or alcohol before the company can subject the employee to a substance abuse test. It is also stated that legislation is necessary to address the issue of the procedures that must be followed in order to ensure the reliability and accuracy of the particular test.[54]

The Commission begins this Report with a discussion of the methodologies used to test employees for substance abuse. In chapter 2, both the strengths and weaknesses of the various procedures will be examined. Chapter 3 is devoted to a discussion of the common law actions available to an employee who has been subjected to mandatory testing. This analysis is of particular relevance to a private sector employee who is not a member of a union. In chapter 4, the Commission examines the protections available to unionized employees. Chapter 5 addresses the issue of whether current testing programs are likely to survive a constitutional challenge under the *Canadian Charter of Rights and Freedoms*,[55] and chapter 6 is devoted to an examination of whether drug and alcohol testing violates the Ontario *Human Rights Code*.[56] Finally, in chapter 7, the Commission discusses the policy reasons with respect to whether employers in this province ought to be permitted to impose testing programs on their employees. The Commission then provides recommendations that address the pressing issue of testing in the workplace.

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[52] D.J. Morikawa, P.J. Hurtgen, T.G. Connor and J.J. Costello, "Implementation of Drug and Alcohol Testing in the Unionized Workplace" (1987), 11 Nova L. Rev. 653, at 654.

[53] See Feldthusen, *supra*, note 4, at 83; and P.J.J. Cavalluzzo and K. Schucher, *The Charter and Human Rights in the Workplace: Are They Working? Drug Testing in the Workplace* (Canadian Bar Association - Ontario, 1991 Institute of Continuing Legal Education, January 1991), at 29-30.

[54] Sanders, *supra*, note 24, at 193; M. Pinsonneault, *Medical Examination and Testing in the Workplace* (Toronto: 1991) (thesis submitted in conformity with the requirements of the LL.M. Degree, Faculty of Law, University of Toronto), at 44-45; and Rothstein, *supra*, note 20, at 424.

[55] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, c. 11 (U.K.).

[56] R.S.O. 1990, c. H.19.

CHAPTER 2

TESTING TECHNIQUES FOR DRUG AND ALCOHOL ABUSE

1. INTRODUCTION

In this chapter, the Commission will examine the techniques used to test employees for drugs and alcohol. In particular, blood tests, urinalyses, breathalyzers, hair analyses and saliva tests will be discussed. By contrast to the other testing techniques, urinalysis will be described in greater detail for the following reasons. The vast majority of workplace testing programs in both Canada and the United States rely on urinalysis.[1] This is attributable to the fact that either the other techniques have not achieved general acceptance in the scientific community or that the testing technique is considered to be too physically invasive, as for example, blood testing. In addition, some of the techniques, such as breathalyzers, are solely capable of testing for alcohol and not for drugs.

2. BLOOD TESTING

The blood stream is a primary pathway for the distribution of drugs and alcohol in the human body.[2] Unlike urinalysis, blood testing actually measures the amount of the particular drug or alcoholic substance in the individual's body.[3] Because the levels of these substances in the blood dissipate within a matter of hours, rather than days or weeks as is the case

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[1] S. Chapnik, "Mandatory Drug Testing In The Workplace" (1989), 5 Admin. L.J. 102, at 103; Addiction Research Foundation, *Issues Related to Drug Screening in the Workplace*, by S. Macdonald, S. Wells, and R. Fry (March 1992) (draft manuscript), at 11-12; T.E. Ullrich, "A Drug-free American Workplace and the Virginia Employer" (1989), 15 Va. B.A.J. 5; Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: 1990); Information and Privacy Commissioner/Ontario, *Workplace Privacy[:] A Consultation Paper* (Toronto: June 1992); A. Abbey and C. Redel, "Drug Testing in the Workplace: Public and Private Sector Employers and the Courts", [1991] Lab. L.J. 239, at 240; and S.S. Cairns and C.V. Grady, "Drug Testing in the Workplace: A Reasoned Approach for Private Employers" (1990), 12 Geo. Mason U.L. Rev. 491, at 495.

[2] W.D. Turkula, *Drug and Alcohol Testing[:] Advising the Employer* (Salem, N.H.: Butterworths, 1991, looseleaf), §6.01, at 6-2.

[3] *Ibid.*

with metabolites in urine, a blood test is a better indicator of proximate use than is urine testing.[4] For example, the blood levels of THC, the active ingredient in *cannabis*, are more closely linked to recent use than are the particular drug metabolites in urine.[5]

Even though the precise drug level in the blood can be quantified, the levels that produce impairment continue to be a subject of debate. According to current scientific data, a correlation does not exist between dosage levels and behavioural effects.[6] For example, a high THC blood level does not necessarily indicate that an individual is impaired.[7] Thus, although blood tests for drugs are a better indicator of proximate use than urinalysis, a blood test cannot establish impairment. This is in sharp contrast to blood testing for alcohol. The blood alcohol concentration in an individual's body is considered to be a strong indicator of impairment.[8]

Despite its advantages, blood testing is seldom used in the workplace context. This is largely attributable to the fact that blood testing is considered to be an invasive procedure.[9] It requires penetration of the body and is accompanied by certain risks such as infection.[10] In addition, extraction of blood samples must be performed by medically trained personnel under sterile conditions.[11] Because of the expense of such a procedure, many employers are reluctant to use this technique to detect substance abuse problems of employees. Another perceived drawback of blood testing is that, like urinalysis, the analysis of a blood sample is capable of revealing numerous physiological facts about an individual including pregnancy, manic

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[4] Cairns and Grady, *supra*, note 1, at 497; and T.S. Denenberg and R.V. Denenberg, "Drug Testing From the Arbitrator's Perspective" (1987), 11 Nova L. Rev. 371, at 402.

[5] Denenberg and Denenberg, *ibid.*

[6] *Ibid.*, at 402-03; Addiction Research Foundation, *supra*, note 1, at 11; "Workplace Drug Testing and the National Institute on Drug Abuse: An Interview with J. Michael Walsh" (1990), 12 Geo. Mason U.L. Rev. 475, at 481-82 (hereinafter referred to as "Interview with J. Michael Walsh"); and A.J. McBay, "Efficient Drug Testing: Addressing the Basic Issues" (1987), 11 Nova L. Rev. 647, at 652.

[7] Denenberg and Denenberg, *supra*, note 4, at 403.

[8] Denenberg and Denenberg, *ibid.*, at 403; E.J. Imwinkelried, "False Positive[:] Shoddy Drug Testing Is Jeopardizing the Jobs of Millions" (1987), 27 The Sciences 22, at 28; and M. Wight, "State Drug Testing Statutes: Legislative Attempts to Balance Privacy and Productivity" (1989), 14 J. Corp. L. 721, at 728.

[9] T.S. Denenberg and R.V. Denenberg, *Alcohol and Drugs: Issues in the Workplace* (2nd ed.) (Washington, D.C.: Bureau of National Affairs, Inc., March 26, 1990) (draft manuscript), ch. D, at 19; K.M. Dubowksi, "Drug-Use Testing: Scientific Perspectives" (1987), 11 Nova L. Rev. 415, at 427; and Wight, *supra*, note 8, at 728.

[10] It also may produce prolonged bleeding in hemophiliac subjects. See Dubowski, *supra*, note 9, at 427; and Wight, *supra*, note 8, at 728.

[11] Turkula, *supra*, note 2, §6.01, at 6-2; and D.G. Evans, *Drug Testing Law, Technology and Practice* (New York: Clark/Boardman/Callaghan, 1990, looseleaf), §5.03, at 16.

depression, diabetes, schizophrenia and heart trouble as well as whether an individual is HIV infected.[12]

3. HAIR TESTING

Testing of hair is another potential source for screening employees for drug use. This new technology has a unique advantage over other testing methodologies as it provides the longest retrospective record of drug intake. Approximately three inches of hair will reveal six months of drug use history.[13] In addition, this technology is considered to be less invasive than other testing techniques. The procedure involves plucking hair strands with roots intact, a process that is less intrusive than, for instance, urine collection or the extraction of blood from an individual.[14] Another stated advantage is that unlike other testing techniques, detection of drug use by hair analysis cannot be evaded by abstention from drugs for a few days prior to the test.[15] Furthermore, since hair is collected under close supervision, there is less opportunity for the adulteration or the switching of specimens than is the case with urine testing.[16] An additional benefit is that hair analysis can be performed at regularly scheduled intervals, such as annual physical examinations, without losing detection efficiency. This avoids the issue of random unannounced testing of employees which has been the subject of much legal debate in the context of urine testing.[17]

Despite the positive features of hair analysis, this procedure is viewed as an unsuitable testing method for several reasons. This new technology is considered by scientists to be inaccurate and unreliable. The National Institute on Drug Abuse in the United States has stated in unequivocal terms that hair testing is not acceptable as an alternative to urinalysis.[18] Moreover, the prevailing judicial attitude in the United States is that hair analysis for substance abuse is experimental and should not be admissible as scientific

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[12] M.R. O'Donnell, "Employee Drug Testing – Balancing the Interests in the Workplace: A Reasonable Suspicion Standard" (1988), 74 Va. L. Rev. 969, at 972.

[13] Wight, *supra*, note 8, at 729; and Dubowski, *supra*, note 9, at 429.

[14] Dubowski, *ibid.*; and J.R. Mooney and D.L. Neigus, "The Problems of Drug Testing in the Private Workplace" (1991), 37 Prac. Law. 57, at 64.

[15] E.J. Cone, "Hair Testing for Drugs[:] Developments in an Infant Science" (1989), 3 Empl. Testing 439, at 441.

[16] W.A. Baumgartner, "Hair Analysis for Drugs of Abuse" (1989), 3 Empl. Testing 442, at 446.

[17] *Ibid.*

[18] Mooney and Neigus, *supra*, note 14, at 64; Evans, *supra*, note 11, §5.03, at 16-17; and Addiction Research Foundation, *Employment Related Drug Screening[:] A Public Health and Safety Perspective* (Toronto: November 1990) (Report of Task Group), at 28.

evidence in a court of law.[19] Another disadvantage of hair analysis in the context of the workplace is that drug use cannot be detected until three or four days have lapsed since the particular drug was ingested. Thus, like the other methods previously discussed, hair testing is not capable of determining impairment; it only can discern past use.[20] A further drawback of this testing procedure is that it is extremely costly.[21]

4. BREATH TESTING

Breath is another specimen that may be tested in order to detect substance abuse problems of employees. Breath contains volatile substances such as alcohol, solvents and their metabolites that reach the breath by diffusion from the blood in the lungs.[22]

An advantage of breath sampling is that it is a relatively non-invasive and inexpensive technology.[23] Moreover, breath testing devices such as Breathalyzer 9000 and 9000A and the Intoxilyzer Model 5000 can be operated by individuals with minimal training.[24] Most importantly, breath sampling is capable of measuring functional impairment.[25]

The drawback of the breath testing procedure is that it is essentially limited to the detection of alcohol. The vast proportion of drugs are not expelled via the breath as easily as alcohol.[26] Nevertheless, it is stated that "breath is a specimen of great promise which is likely to become the specimen of choice for many drugs with continued advances in analysis technology".[27]

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[19] See Cairns and Grady, *supra*, note 1, at 501.

[20] Wight, *supra*, note 8, at 729; Mooney and Neigus, *supra*, note 14, at 64; and Cairns and Grady, *supra*, note 1, at 501.

[21] Wight, *supra*, note 8, at 729.

[22] K.M. Dubowski and R.S. Tuggle III, *Drug-Use Testing in the Workplace: Law and Science* (Eau Claire, Wis.: PESI, 1990), §3.12, at 82.

[23] Dubowski, *supra*, note 9, at 428; and McBay, *supra*, note 6, at 651.

[24] Turkula, *supra*, note 2, §6.02, at 6-4 to 6-5; and McBay, *supra*, note 6, at 651.

[25] Cairns and Grady, *supra*, note 1, at 500.

[26] Wight, *supra*, note 8, at 729.

[27] Dubowski, *supra*, note 9, at 429; and Wight, *ibid.*

5. SALIVA TESTING

Saliva testing is another potential method of screening employees for drugs and alcohol. As with breath sampling and hair analysis, saliva sampling is only slightly invasive.[28] The sample may be obtained by spitting on a blotter strip or dental sponge. Nevertheless, saliva testing has not been used either forensically or in the workplace, as research on this technology is still in its early stages.[29]

6. URINALYSIS

Urine testing of employees and prospective employees is the most common type of workplace testing in Canada and the United States. Unlike blood testing, which actually measures the amount of a given drug in the body, urinalysis measures metabolites, which are the inert, inactive by-products of the drug ingested by an individual.

Urine has become the principal specimen material used for testing in the workplace for several reasons. First, urine testing is capable of large scale application, a result of the fact that in the 1970s relatively inexpensive testing procedures were introduced into the market. Second, urine is typically available in larger volumes than other biological specimens, and the metabolites are generally stable in urine which allows for long-term storage.[30] In addition, because drug metabolites in urine can remain in a person's system for weeks after initial ingestion, detection of drug use can be determined over a longer period of time than is possible with some of the other testing techniques.[31] Furthermore, the collection of urine is considered to be less invasive than the procurement of blood samples which entails physical invasion of the body.[32]

The Commission will now examine some of the urine testing techniques available to management to detect drug and alcohol use of employees in their respective workplaces.

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[28] Wight, *ibid.*

[29] *Ibid.*

[30] Dubowski and Tuggle III, *supra*, note 22, §3.22, at 90; and Cairns and Grady, *supra*, note 1, at 499.

[31] Dubowski, *supra*, note 9, at 434.

[32] Cairns and Grady, *supra*, note 1, at 499.

(a) IMMUNOASSAYS

The immunoassay is the most common procedure used for substance testing in the workplace.[33] The enzyme immunoassay method, of which the EMIT brand is the best known, is used by the vast proportion of employers who have introduced mandatory testing programs.[34] Under this procedure, antibodies are used to detect the presence of drugs in the subject's urine.[35] The enzyme immunoassay technique is capable of testing for the presence of amphetamines, barbiturates, benzodiazepine (Valium), cannabinoid (marijuana), cocaine, ethyl alcohol, methadone, opiates (heroin, morphine), methaqualone (Qualude) and phencyclidine (PCP).[36] The main advantages of the immunoassay test are its low cost, as well as the fact that extensive technical skills are not necessary either to conduct the test or to interpret the test results. Moreover, the test is quickly administered.[37] Finally, this testing technique is highly sensitive in that minute concentrations of metabolites can be detected in an individual's urine.[38]

Although the enzyme immunoassay method is inexpensive and it enables employers to test on a mass scale, its accuracy is particularly suspect.

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[33] *Ibid.*, at 501.

[34] B. Feldthusen, "Urinalysis Drug Testing: Just Say No" (1988), 5 Can. Hum. Rts.Y.B. 81, at 85; A. Sanders, "Intoxication and the Law: Drug Testing in the Workplace", [1987] Ann. Surv. Am. L. 167, at 187; R.L. Stone, "Mass Round-Up Urinalysis and Original Intent" (1987), 11 Nova L. Rev. 733, at 740; K.W. Yeam, "Involuntary Random Post-Employment Drug Testing in the Public and Private Sectors" (1986), 20 Beverley Hills B.J. 168, at 171; and S.J. Winotsky, "The Ideology of Drug Testing" (1987), 11 Nova L. Rev. 763, at 764.

[35] Turkula, *supra*, note 2, §6.04, at 6-7. The enzyme immunoassay method detects drug use by attaching an enzyme to a metabolite of the drug to be detected (the labelled drug). The urine specimen is then mixed with a reagent containing antibodies to the drug and the labelled drug is mixed with the specimen. The enzyme in the labelled drug will react with any remaining antibodies to the drug, thereby reducing the enzyme activity. The level of enzyme activity is directly related to the concentration of the drug present in the urine sample.

The radioimmunoassay method is a similar process, but it "labels" the drug to be detected or its metabolite with radioactive material rather than with an enzyme. Because of the radioactive material used and because the procedure requires complex equipment and training, this method is generally not used in the workplace setting. See the Committee on Labor and Employment Law, "Drug Testing In The Workplace" (1988), 43 A.B.N.Y.C. Record 447, at 453.

[36] Turkula, *supra*, note 2, §6.04, at 6-7.

[37] Cairns and Grady, *supra*, note 1, at 501; Feldthusen, *supra*, note 34, at 85; J.S. Goldkamp, M.R. Gottfredson and D. Weiland, "Pretrial Drug Testing and Defendant Risk" (1990), 81 J. Crim. L. & Criminology 585, at 613; H.J. Glasbeek and D. McRobert, "Privatizing Discipline – The Case of Mandatory Drug Testing" (1989), 9 Windsor Y.B. Access Just. 30, at 41; and T.A. Halbert, "'Coming Up Dirty': Drug Testing at the Work Place" (1987), 32 Villanova L. Rev. 691, at 711.

[38] Imwinkelried, *supra*, note 8, at 25.

Many false positives are elicited by the enzyme immunoassay test.[39] A false positive result is a positive rating that occurs despite the fact that the particular drug is not present in the subject's body.[40]

The most pronounced technological flaw of the enzyme immunoassay test is its lack of specificity, which is the inability to distinguish between drug and non-drug compounds.[41] This is because many substances possess molecular and electrochemical patterns similar to the drugs that the test was designed to identify.[42] Cross-reactions can occur from over-the-counter medical products as well as certain foods and chemicals occurring naturally in the body.[43] For instance, cold remedies such as Contact C and Sudafed have registered positive for amphetamines, pain relievers such as ADVIL and DATRIL have produced positive results for marijuana, and cough syrups often register opiate traces. Furthermore, a person who has ingested poppyseeds prior to a urinalysis test may generate a false positive result for heroin, and certain herbal teas have produced positive results for cocaine.[44] According to the studies, a 12.5 percent false positive rate has been attributed to the EMIT test for amphetamines, 10 percent for cocaine, 9.7 percent for barbiturates, 8.7 percent for cocaine and 5.6 percent for opiates.[45]

Because of the inherent limitations of immunoassays, most scientists subscribe to the view that the tests should only be utilized as a preliminary screening procedure. Immunoassay tests are referred to by those in the field

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[39] Addiction Research Foundation, *Workplace Drug and Alcohol Testing: Where to Draw the Line* (Toronto: February 1991); Stone, *supra*, note 34, at 740-41; Wisotsky, *supra*, note 34, at 764; and D. Bearman, "The Medical Case Against Drug Testing" (1988), 1 Harv. Bus. Rev. 126, at 126.

[40] W.S. Armington, "Urinalysis Drug Testing of Private Employees: A Call for Legislation in Pennsylvania" (1987), 91 Dick. L. Rev. 1015, at 1020-21; and Canadian Bar Association, *Report of the Canadian Bar Association-Ontario Committee to Study the Implications of Mandatory Drug Testing in the Workplace* (July 1987), at 11.

[41] E.J. Imwinkelried, "Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing" (1987), 11 Nova L. Rev. 563, at 568.

[42] Bearman, *supra*, note 39, at 126.

[43] *Ibid.*; Yeam, *supra*, note 34, at 171; and Feldthusen, *supra*, note 34, at 86. For example, melanin occurring in skin pigments: see Dubowski and Tuggle III, *supra*, note 22, §4.10, at 106.

[44] Armington, *supra*, note 40, at 1021; Halbert, *supra*, note 37, at 710; Sanders, *supra*, note 34, at 187; Addiction Research Foundation, *supra*, note 18, at 29; and B. Laitner, "Poppy-seed muffin shows drug tests are out to lunch", *The Toronto Star* (February 3, 1992) at D1.

[45] The National Institute on Drug Abuse states that this test gives false readings between 5 to 20% of the time: see Sanders, *supra*, note 34, at 186.

as "presumptive" in that they merely indicate possible drug use.[46] This means that when an employee tests positive on an EMIT test, her urine specimen should be subjected to a confirmation test. The confirmation test, scientists stress, should be a more reliable and sophisticated chemical procedure than the immunoassay method.[47] Some district courts in the United States have explicitly rejected the immunoassay method as the sole means of identifying substance abuse of individuals in the workforce.[48]

Despite the pervasive view that positive results from an immunoassay test should not be relied upon by an employer until the urine specimen has undergone confirmatory testing, unconfirmed immunochemical testing continues to be practised by employers to influence hiring.[49] In addition, there is evidence, particularly in the United States, that a significant number of employers have imposed disciplinary measures such as demotion, compulsory rehabilitation, or dismissal on employees who have tested positive on an immunoassay test.[50] The reluctance of management to subject the results of a screening test to confirmatory testing is largely attributable to the high cost of these more accurate and sophisticated procedures.

(b) Thin-Layer Chromatography

Chromatography is a method of analysis in which the various components of a biological specimen undergo a partitioning process.[51] In thin-layer chromatography, known as TLC, an absorbent material such as silica gel is applied to a glass plate. This is called the stationary phase. Mixtures of known drug compounds or residues from an extraction of drugs from urine are applied as spots to prepared plates, which are then placed in a closed container with just enough solvent (mobile phase) to wet the bottom

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[46] Denenberg and Denenberg, *supra*, note 9, ch. A, at 23.

[47] M.A. Rothstein, "Screening Workers for Drugs: A Legal and Ethical Framework" (1985-86), 11 Empl. Rel. L.J. 422, at 427; B. Beyerstein, M. Jackson and D. Beyerstein, *Drug Testing in the Workplace* (1989) (position paper of the British Columbia Civil Liberties Association), at 6; M.L. Waple, "Drug Tests: Issues Raised in the Defense of a 'Positive' Result" (1987), 11 Nova L. Rev. 751, at 758; Goldkamp, Gottfredson and Weiland, *supra*, note 37, at 613; E.J. Imwinkelried, "The Debate Over Drug Testing in the Workplace: A Novel Opportunity for Public Scientific Education" (1991), 9 Behavioural Sci. & L. 305, at 313; Imwinkelried, *supra*, note 41, at 599; and Sanders, *supra*, note 34, at 188.

[48] Yeam, *supra*, note 34, at 171.

[49] Rothstein, *supra*, note 47, at 427.

[50] See Rothstein, *ibid.*; and Feldhusen, *supra*, note 34, at 86.

[51] Evans, *supra*, note 11, §5:01, at 5; and Addiction Research Foundation, *supra*, note 18, at 21.

of the plate. The solvent then flows across the stationary phase, which causes the substances to separate. These separated substances are then identified by spraying the plate with reagents that produce particular colour reactions.[52] Both the position and tint of the spots identify the characteristics of the urine. The advantages of the TLC procedure are its low cost, its relatively rapid analysis and its ability to often detect low concentrations of drugs.[53]

Although this process is more accurate than the immunoassay method, thin-layer chromatography is nevertheless too unreliable to be used except as an initial screening test.[54] TLC is extremely sensitive to environmental factors such as temperature and humidity. In addition, the procedure is highly labour intensive and heavily dependent for its accuracy on the skill, experience and judgment of the technician. The technician must have the ability to recognize the migration and colour pattern of the abused substance and to distinguish those from similar patterns of other substances.[55] Therefore, like the immunoassay technique, the TLC test must be independently confirmed by a more sophisticated chemical process. In other words, thin-layer chromatography, standing alone, does not provide positive proof of the presence of specific drugs.[56] As Dubowski and Tuggle state in *Drug-Use Testing in the Workplace: Law and Science*, "[t]he importance of independent confirmation by other appropriate means of the identity of drugs and metabolites identified tentatively by TLC cannot be overemphasized".[57]

(c) Gas Chromatography

Gas chromatography (GC), also referred to as gas-liquid chromatography (GLC), is used in drug analysis as a confirmation method and less frequently as a preliminary screening of test specimens.[58] It uses an inert gas, such as nitrogen or helium, to transport a vaporized sample of a drug through a glass column containing a liquid. The drug is identified and

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[52] See discussion of TLC procedure in Evans, *supra*, note 11, §5:01, at 5-6.

[53] Dubowski and Tuggle III, *supra*, note 22, §5.4, at 119.

[54] *Ibid.*, §5.4, at 122.

[55] *Ibid.*, §5.4, at 120; and Addiction Research Foundation, *supra*, note 18, at 21.

[56] Dubowski and Tuggle III, *supra*, note 22, §5.5, at 124.

[57] *Ibid.*, §5.4, at 121.

[58] Evans, *supra*, note 11, §5.01, at 6.

quantified by a detector, known as a chromatogram, at the far end of the column.[59]

The GC procedure requires specialized equipment and high quality laboratories. In addition, interpretation of the chromatogram requires a skilled and experienced analyst. Even in circumstances in which these requirements are met, the results may not be conclusive because "[n]o one knows how many dozen, hundreds, or even thousands of chemical compounds can or will have an identical retention time, peak shape, and detector response".[60] Consequently, gas chromatography is not generally accepted in the scientific community as sufficiently specific for positive identifications.[61]

(d) Gas Chromatography/Mass Spectrometry

Gas chromatography, when combined with mass spectrometry (GC/MS), is said to virtually guarantee accurate identification of the substance in an individual's urine.[62] The analytical technique of GC/MS "combines the efficient separating power of gas chromatography with the high sensitivity and specificity of mass spectrometric detection".[63] As Evans explains:[64]

> The gas chromatograph (GC) first separates a concentrated and specially prepared urine specimen into molecular or chemical components. The mass spectrometer (MS) then subjects each separate component to high energy bombardment. The chemicals fragment into ions. The ions have an electrical charge that is measurable. Mass spectrometry provides a unique molecular 'fingerprint' characteristic of each drug or metabolite. An analyst can compare the 'fingerprint' with 35,000 chemicals to determine the exact drug compound. The GC/MS process can identify compounds in concentrations as low as parts per billion.

This sensitive and highly accurate testing technique, which requires skilled technicians and sophisticated instruments, is referred to as "the gold standard of testing". In fact, the United States Supreme Court has stated that GC/MS is a highly reliable and acceptable method of testing.[65] However,

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[59] Dubowski and Tuggle III, *supra*, note 22, §5.15, at 147 and §5.16, at 150.

[60] Dubowski, *supra*, note 9, at 474; and Wight, *supra*, note 8, at 732.

[61] Waple, *supra*, note 47, at 757.

[62] Imwinkelried, *supra*, note 8, at 26.

[63] Evans, *supra*, note 11, §5.01, at 8.

[64] *Ibid.*, §5.01, at 8-9.

[65] *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989). See, also, Evans, *supra*, note 11, §5.01, at 8-10.

because the testing technique is exceedingly expensive – testing a single urine sample costs between eighty to one hundred dollars in contrast to five to ten dollars for an EMIT test – it is only economically feasible as a confirmatory method.[66]

7. SCREENING AND CONFIRMATORY TESTING

The results of screening tests alone lack the validity necessary for the imposition of measures by management that adversely affect the testee, such as denial of employment to job applicants, or the imposition of disciplinary sanctions on current employees.[67] Screening tests, such as immunoassays and thin-layer chromatography, simply separate potential users from non-users of drugs and alcohol.[68] A sample that produces a positive result on a screening test should be retested in order to reduce the possibility of a false positive result. According to researchers, the confirmatory method used to retest the sample should not be subject to the same type of error as the procedure used for the initial test.[69] Moreover, results obtained from a screening test, such as the immunoassay method, cannot be validly confirmed by another screening test, such as thin-layer chromatography. As previously mentioned, the most reliable confirmatory procedure for urine testing is gas chromatography/mass spectrometry (GC/MS). In circumstances in which an immunoassay test result is confirmed by GC/MS, the error rate can be reduced to less than one percent.[70]

In its report entitled *Booze, Pills and Dope [:] Reducing Substance Abuse in Canada*,[71] the Standing Committee of the House of Commons recommended that all positive test results be confirmed by GC/MS or a test of equal precision and specificity.[72] In the United States, the National Institute on Drug Abuse (NIDA) Mandatory Guidelines for Federal Workplace Testing require that two separate tests based on totally different chemical principles be conducted on a urine sample. In circumstances in which the result from an immunoassay test is positive, the sample must be

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[66] Halbert, *supra*, note 37, at 711.

[67] Waple, *supra*, note 47, at 757-58; Imwinkelried, *supra*, note 41, at 602; and Turkula, *supra*, note 2, §6.03, at 6-6.

[68] Armington, *supra*, note 40, at 1019.

[69] Evans, *supra*, note 11, §5.02, at 14; Sanders, *supra*, note 34, at 188; and Addiction Research Foundation, *supra*, note 18, at 26.

[70] N. Roth, "Drug Testing in the Private Sector" (1987), 31 Boston B.J. 32, at 35.

[71] Canada, House of Commons (report of the Standing Committee on Health and Welfare), (Ottawa: October 1987).

[72] See Chapnik, *supra*, note 1, at 107.

reanalyzed by the GC/MS method.[73] In addition, some of the American states that have promulgated testing legislation require that a "GC/MS test or a scientifically equivalent test be used for confirmation purposes".[74]

Many Canadian and American observers state that in jurisdictions in which workplace testing is permitted, the respective legislatures ought to ensure that employers retest screening results by more reliable procedures. However, as previously mentioned, due to the expense of performing GC/MS, the practice of confirming immunoassay tests is far from universal.[75] As one writer states:[76]

> It is impossible to say exactly how many employers rely solely on immunoassay tests to analyze their workers' urine. But given that market incentives favor such shortcuts, and that private drug testing remains wholly unregulated, the practice may well be widespread. That it generates false-positives is indisputable.

It is also suggested that after a positive result has been confirmed, the employee should be afforded a fair opportunity to rebut the test result before any sanctions are imposed. It is important to allow employees to challenge test results because several variables other than drug use may be responsible for a false positive reading.[77] The municipality of San Francisco, which in 1985 was the first legislative body to enact a testing statute, requires that: (1) the employer at his expense must provide the employee with the opportunity to have the sample tested at an independent laboratory; and (2) the employer must provide the employee with a reasonable opportunity to explain or rebut the results.[78] The San Francisco statute applies to urine testing, blood testing and testing by encephalographic waves.[79] Similarly,

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[73] Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11970-11989 (1988); and "Interview with J. Michael Walsh", *supra*, note 6, at 483. See, also, Health and Welfare Canada, *Canadian Laboratory Standards For Drug Screening in the Workplace* (Ottawa: July 1990) (draft guidelines), §3.4.6, at 16 (hereinafter referred to as "Health and Welfare Canada draft guidelines").

[74] See, for example, Conn. Gen. Stat. Ann. §31-51U (West Supp. 1991); R.I. Gen. Laws §28-6.5-1(D) (Michie Supp. 1990); and Vt. Stat. Ann. tit. 21, §514(6)(A) (1987). See, also, Cairns and Grady, *supra*, note 1, at 522; and O'Donnell, *supra*, note 12, at 981.

[75] See Denenberg and Denenberg, *supra*, note 4, at 381; Feldthusen, *supra*, note 34, at 86; Chapnik, *supra*, note 1, at 104; Committee on Labor and Employment Law, *supra*, note 35, at 456; Imwinkelried, *supra*, note 8, at 26; and Rothstein, *supra*, note 47, at 427.

[76] Imwinkelried, *supra*, note 8, at 26.

[77] Sanders, *supra*, note 34, at 191.

[78] San Francisco City Ordinance No. 527-85 (1985). See C. Palefsky, "Corporate Vice Precedents: The California Constitution and San Francisco's Worker Privacy Ordinance" (1987), 11 Nova L. Rev. 669, at 677.

[79] Palefsky, *ibid.*, at 676.

legislation in the states of Maine,[80] Vermont,[81] Rhode Island[82] and Montana[83] requires that an employer must allow an employee to have his sample independently tested and, further, must institute appeal procedures to ensure that the employee has the opportunity to contest the accuracy of a test result.

8. THE LIMITATIONS OF URINE TESTING

Although urine testing of employees and prospective employees remains the most common type of workplace testing, it continues to be heavily criticized. Some attack the procedure as invasive and many question the relevance of urine test results to legitimate employer concerns. Others are critical of the absence of government regulation of workplace testing.

In this section, the problems associated with urine testing will be discussed. Some of the weaknesses of this testing procedure are endemic to the technology and cannot be remedied absent significant scientific developments. Other problems associated with workplace urine testing, such as lack of testing standards in laboratories, tampering of urine specimens, chain of custody problems and issues of confidentiality, can to a limited extent, be rectified by the introduction of legislation.[84]

(a) The Significance of a Positive Urine Test

Critics of mandatory testing in the workplace caution against ascribing too much significance to a positive urine test. This is because even if the test is meticulously conducted, and even if the most sophisticated technology is used, urinalysis cannot establish impairment.[85] The sole permissible inference that can be drawn from a urine test is the presence of a drug in

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[80] Me. Rev. Stat. Ann. tit. 26, §683.5.A (West Supp. 1991).

[81] Vt. Stat. Ann., *supra*, note 74, §515.

[82] R.I. Gen. Laws, *supra*, note 74, §28-6.5.1(E) and (F).

[83] Mont. Code Ann. §39-2-304(3) (1991).

[84] Note that this discussion is pertinent to other testing techniques.

[85] Addiction Research Foundation, *supra*, note 18, at 7; Wight, *supra*, note 8, at 753; Feldhusen, *supra*, note 34, at 80; Committee on Labor and Employment Law, *supra*, note 35, at 475; Canadian Bar Association, *supra*, note 40, at 5; Beyerstein, Jackson and Beyerstein, *supra*, note 47, at 1; Armington, *supra*, note 40, at 1020; and J.B. Jacobs and L. Zimmer, "Drug Treatment and Workplace Drug Testing: Politics, Symbolism and Organizational Dilemmas" (1991), 9 Behavioural Sci. & L. 345, at 347.

the subject's system at an indefinite earlier time.[86] As Imwinkelried states, "[j]ust when that was, how much of the drug was ingested, and what degree of impairment it caused cannot be determined from a urine sample".[87] Therefore, it is argued, the correlation between a positive urine test and job performance is tenuous.[88]

Urinalysis only detects inert metabolites in the urine, which as previously mentioned, are the end-products of drugs processed by the body that do not contain the intoxicating ingredient of the drug. Drug metabolites are excreted in the urine days, weeks and sometimes a month after the drug was ingested.[89] For example, the metabolites produced by cocaine and heroin may linger in urine for three days, long after the intoxicating effect of the drug has worn off. Similarly, phencyclidine, known as "PCP" or "Angel Dust", is stored in the body for a long period after the person has ingested the substance. Traces of THC, the metabolite for marijuana, can be detected in urine for up to thirty days after ingestion.[90] This means that an employee who has smoked marijuana in the privacy of her home, weeks prior to a workplace urine test, may test positive. Furthermore, passive inhalation of marijuana, for example, at a party or in a car, can produce positive test results.[91]

Urine tests are also incapable of ascertaining whether the subject is a heavy, moderate or occasional drug user.[92] According to statistics, a very small proportion of the workforce are addicts or chronic consumers of

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[86] See authorities referred to in note 85, *supra*. See, also, Addiction Research Foundation, *supra*, note 39; Addiction Research Foundation, *supra*, note 1, at 11; and L.M. Tennassee, *A Perspective on Drug Testing in the Workplace* (Banff, Alta.: 1988) (presented at national conference, at 6.

[87] *Supra*, note 8, at 28.

[88] K.B. Zeese, "Drug Hysteria Causing Use Of Useless Urine Tests" (1987), 11 Nova L. Rev. 815, at 820; Winotsky, *supra*, note 34, at 764; Canadian Human Rights Commission, *Policy 88-1[:] Drug Testing* (Ottawa: January 1988); and Addiction Research Foundation, *supra*, note 39, at 29. In contrast to alcohol, the concentration of drugs in urine does not prove a contemporary altered physical or psychic condition. However, the problem with testing urine to detect alcohol abuse is that in less than six hours from ingestion, the presence of the metabolites may not be detectable.

[89] Cairns and Grady, *supra*, note 1, at 505.

[90] Addiction Research Foundation, *supra*, note 18, at 25; Feldthusen, *supra*, note 34, at 88; Cairns and Grady, *supra*, note 1, at 505; E.M. Chen, P.T. Kim and J.M. True, "Common Law Privacy: A Limit on an Employer's Power to Test for Drugs" (1990), 12 Geo. Mason U.L. Rev. 651, at 679; and Bearman, *supra*, note 39, at 126.

[91] Dubowski and Tuggle III, *supra*, note 22, §§7.15, 7.16, at 213; Deneenberg and Deneenberg, *supra*, note 9, ch. C, at 26; and Feldthusen, *supra*, note 34, at 86.

[92] Bearman, *supra*, note 39, at 126; Feldthusen, *supra*, note 34, at 90; and Chapnik, *supra*, note 1, at 104.

drugs.[93] Researchers state that a person who tests positive on a urine test is statistically likely to be an occasional marijuana smoker.[94] It is also interesting to observe that while a social smoker of marijuana who inhaled a joint ten days prior to a urine test will likely test positive, the results from a urine test of a chronic alcoholic who was heavily intoxicated ten hours prior to the test will likely be negative.[95]

In summary, urine tests are not capable of establishing impaired job performance. Urinalysis fails to discriminate between a person who is presently under the influence of drugs and a person who has ingested drugs in the past. As the Canadian Human Rights Commission,[96] the Canadian Bar Association - Ontario[97] and the British Columbia Civil Liberties Association[98] state, one cannot legitimately infer a relationship between a positive urine test and the capacity of an employee to perform his job.

(b) The Testing Standards of Laboratories

The testing standards of laboratories that conduct urinalysis directly affect the accuracy and reliability of test results. Studies indicate that laboratories in North America vary widely in their accuracy, diligence and reliability. The qualifications of technicians and supervisors, the scientific thoroughness of the procedure, and the care with which samples are handled, differ radically amongst laboratories.[99] A blind study of United States laboratories that analyze urine specimens of employees concluded that only a small proportion of laboratories operate according to acceptable standards.[100]

It is important to appreciate that an employee may face "industrial capital punishment" on the basis of a laboratory report. An employee may be discharged, disciplined or compelled to attend an employee assistance program as a result of a positive urine test.[101] Defective laboratory

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[93] See Addiction Research Foundation, *supra*, note 39; and Chen, Kim and True, *supra*, note 90, at 679.

[94] Chen, Kim and True, *ibid.*

[95] J.T. Wrich, "Beyond Testing: Coping with Drugs at Work" (1988), 1 Harv. Bus. Rev. 120, at 127.

[96] Canadian Human Rights Commission, *supra*, note 88.

[97] Canadian Bar Association, *supra*, note 40, at 29.

[98] Beyerstein, Jackson and Beyerstein, *supra*, note 47.

[99] Denenberg and Denenberg, *supra*, note 4, at 404.

[100] Tennassee, *supra*, note 86, at 6.

[101] Denenberg and Denenberg, *supra*, note 4, at 404.

equipment as well as unqualified technicians undoubtedly increase the risk that an employee will be reprimanded on the basis of false test results. As an American writer observes:[102]

> If people are to be judged by the contents of their urine, surely the laboratory making the judgments should be held to *some* standards. That laboratories with error rates of twenty-five to sixty percent are determining whether people will keep their jobs is a disgrace; if even *one percent* of the millions of untainted urine samples American workers produce this year are read as positive, tens of thousands of innocent individuals will be victimized.

In order to ensure reliable test results, it is advocated that legislation be introduced to regulate laboratories that perform workplace testing.[103]

It is argued that workplace testing services ought to subscribe to the "forensic philosophy"[104] characteristic of laboratories that perform law enforcement. These laboratories "take a very defensive approach to the entire analytical process, and impose strict controls to ensure that each and every activity in the laboratory can withstand legal scrutiny".[105] Although workplace testing shares many of the constraints and demands of other classical forensic toxicology tasks, it is now largely performed in nonforensic laboratory settings such as independent clinical laboratories. Moreover, the testing is generally performed by personnel who have little or no experience

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[102] Imwinkelried, *supra*, note 8, at 28.

[103] D.T. Bliss, "Employee Drug Testing: Lessons to be Learned from the Transportation Initiative" (1988), 35 Fed. B. News J. 280, at 282; and Armington, *supra*, note 40, at 1050.

[104] Denenberg and Denenberg, *supra*, note 4, at 406. The Health and Welfare Canada draft guidelines, *supra*, note 73, §4.1.2, at 28-29, state:

> The possible impact of a positive test result on an individual's livelihood or rights, together with the possibility of a legal challenge of the result, sets this type of test apart from most clinical laboratory testing. In fact, *urine drug testing should be considered a special application of analytical forensic toxicology*. That is, in addition to the application of appropriate analytical methodology, the specimen must be treated as evidence, and all aspects of the testing procedure must be documented and available for possible court testimony. Laboratories engaged in urine drug testing for agencies will require the services and advice of a qualified forensic toxicologist, or individual with equivalent qualifications (both training and experience) to address the specific needs of the drug testing program, including the demands of chain of custody of specimens, security, proper documentation of all records, storage of positive specimens for later or independent testing, presentation of evidence in court, and expert witness testimony.

[105] Denenberg and Denenberg, *supra*, note 4, at 406, quoting from Hoyt, Flanigan, Nee, Shults and Butler, *Drug Testing in the Workplace: Are Methods Legally Defensible[:] A Survey of Experts, Arbitrators, and Testing Laboratories* (North Carolina: Compuchem Laboratories, 1986) (unpublished manuscript), at 17.

in forensic laboratory operations.[106] It is noteworthy that some of the tests are not even conducted in laboratories but on company premises; some employers have purchased kits and have become "instant toxicologists".[107]

Laboratory certification is required by some of the American states that have introduced workplace testing legislation. For example, statutes enacted in Iowa,[108] Minnesota[109] and Vermont[110] stipulate that testing is to be conducted solely by independent laboratories designated by the Department of Health or other government agencies. These laboratories must satisfy strict standards with respect to personnel, methodology and equipment, on-site confirmation of screening tests, security, and confidentiality of test results.

(c) The Tampering and Substitution of Urine Samples

Another problem that contributes to inaccurate test results is the tampering and substitution of test samples.[111] False negatives may occur when the individual being tested switches, dilutes or adulterates his urine specimen so that the test fails to detect chemicals that were actually present in his system.[112] For example, the subject may carry in a separate vial of urine obtained from another person or from a commercial source, and he may switch that urine for the newly voided specimen. Moreover, dilution of urine to reduce drug concentrations below readily detectable levels can be accomplished by adding toilet bowl water or sink water to the specimen. An employee can also drink an excessive amount of water twenty-four hours prior to a test in order to dilute his urine. Adulterating a specimen can be achieved by adding ammonia, salt or vinegar to the urine which will alter the PH level in the sample.[113]

Because of the opportunities for employees to manipulate their test results, some employers require that employees be directly observed while providing urine specimens. This has produced an adverse reaction from civil libertarians, unions, and many academics who contend that personal observation constitutes a serious infringement of the employee's privacy

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[106] Dubowski, *supra*, note 9, at 418. See, also, McBay, *supra*, note 6, at 649.

[107] Rothstein, *supra*, note 47, at 426.

[108] Iowa Code Ann. §730.5.3c (West Supp. 1991).

[109] Minn. Stat. Ann. §181.953 (West Supp. 1991).

[110] *Supra*, note 74, §518.

[111] Armington, *supra*, note 40, at 1020-21; and Bearman, *supra*, note 39.

[112] Armington, *supra*, note 40, at 1020-21.

[113] Bearman, *supra*, note 39, at 126; and Cairns and Grady, *supra*, note 1, at 500.

rights. It is argued that several alternate measures can be taken by an employer to prevent fraudulent results. These include measuring the temperature of the urine sample at the time it is collected, placing a blue dye in the toilet water, and cutting off all other sources of water at the test site.[114] The risk of tampering can also be significantly reduced by requiring employees to leave outer clothing, handbags and parcels outside the collection area.

(d) Positive Test Results: The Lack of Thresholds

Urinalysis does not test for the presence or absence of drug metabolites but for a critical quantity of the metabolites.[115] Under a typical arrangement between an employer and a laboratory, the laboratory will determine the cut-off concentrations of a particular substance below which the test will not be considered positive. In other words, positive is not an objective scientific threshold but rather is the result of an administrative decision by a laboratory.[116]

Many advocate that cut-off concentrations ought to be standardized by the legislature in order to promote uniformity in the reporting of positive test results. The establishment of minimum cut-off values for the determination of positive results serves to enhance the reliability of results. By eliminating those samples found to contain marginal concentrations of intoxicating substances, positive test results will not be based on methodologies operating near the limits of their detection capabilities.[117] In addition, the cut-off value can be set high enough to differentiate between quantities that result from inhalation and those produced by ingestion.[118] Some states, such as Maine[119] and Vermont,[120] have established minimum quantities of substances below which test results will not be considered positive.

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[114] Cairns and Grady, *ibid*; Denenberg and Denenberg, *supra*, note 4, at 407; and O'Donnell, *supra*, note 12, at 999-1000.

[115] Bearman, *supra*, note 39, at 126.

[116] Denenberg and Denenberg, *supra*, note 9, ch. C, at 17. See, also, Feldhusen, *supra*, note 34, at 85.

[117] Dubowski, *supra*, note 9, at 551.

[118] Inwinkelried, *supra*, note 41, at 591; and Waple, *supra*, note 47, at 762.

[119] *Supra*, note 80, §683.G.

[120] *Supra*, note 74, §514(8).

(e) Chain of Custody

The accuracy of test results is heavily dependent on the procedures followed in the collection, identification, handling and conservation of the biological samples.[121] Urine samples are often treated quite casually in the workplace setting – samples have been left unattended in employers' mailrooms or similarly neglected while being transported to a laboratory.[122] It is suggested that guidelines be imposed by the legislature on employers and laboratories to ensure that the sample to be tested does in fact come from the specified employee and that the sample was not tampered with while in transit to the laboratory or during processing.[123]

Assuring an unbroken chain of custody in urine testing is considered to be difficult for two reasons. First, the laboratories are generally some distance from where the urine specimen is collected and second, urine specimens are subjected to multiple tests.[124] Chain of custody must be scrutinized at the worksite, from the worksite to the laboratory, and at each step of the laboratory's testing procedures, including the aliquoting procedures, the presumptive screening tests and the confirmatory testing.[125] To ensure the integrity of the urine specimen, the sample should be sealed with indestructible tape and should be shipped in a locked container. Furthermore, it is essential that all steps in the process be recorded.[126]

Several American states have enacted legislative provisions requiring that all phases of sample collection and testing be subjected to stringent chain of custody procedures. For example, Maine,[127] Vermont,[128]

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[121] See Canada, House of Commons, *supra*, note 71; Cairns and Grady, *supra*, note 1, at 499; Sanders, *supra*, note 34, at 188; Waple, *supra*, note 47, at 758-59; and Armington, *supra*, note 40, at 1021.

[122] Denenberg and Denenberg, *supra*, note 9, c. C, at 1.

[123] Bliss, *supra*, note 103, at 282; and Chen, Kim and True, *supra*, note 90, at 663.

[124] Waple, *supra*, note 47, at 758-59.

[125] *Ibid.*, at 759. See, also, Glasbeek and McRobert, *supra*, note 37, at 42.

[126] See Evans, *supra*, note 11, §§5.09-5.13, at 40-52, for a discussion of suggested chain of custody procedures.

[127] *Supra*, note 80, §683.D.

[128] *Supra*, note 74, §514(5).

Minnesota,[129] as well as Nebraska[130] have imposed chain of custody procedures on workplace testing in order to ensure proper identification, labelling and handling of biological specimens.[131]

(f) Privacy Concerns

Several aspects of urinalysis testing pose privacy concerns. Exposure of the human anatomy, forced extraction of bodily fluids, compelled disclosure of intimate medical information, surveillance of off-the-job conduct, and dissemination of test results are some of the privacy interests that may be infringed when an employee is subjected to mandatory testing.[132]

The procedures followed by many employers for the collection of urine samples intrude upon an individual's bodily integrity and private bodily functions. Some employers require direct surveillance of the employee during urine collection. It is obviously extremely humiliating for an employee to be observed while engaging in the private act of urinating. Even in circumstances where urine collection is not visually witnessed but monitored by an official standing outside the washroom stall, the process is nevertheless degrading. Some writers also assert that urine testing is invasive of the employee's "psychological integrity". As these American authors state:[133]

> Compelled urine testing thus occurs in an atmosphere of distrust and is imbued with a presumption of guilt rebutted only by a favorable test result, thus exacerbating the trespassory intrusion by threatening the employee's 'psychological integrity'.

Procedures can be imposed by the legislature in order to minimize the intrusion on the privacy of the employee with respect to the collection of urine samples. As previously discussed, toilet bowl water can be coloured and the temperature of the urine specimen measured at the collection site. The workplace testing legislation in Connecticut[134] and Rhode Island[135] explicitly prohibits the direct observation of employees or prospective

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[129] *Supra*, note 109, at 181.953.5.

[130] Neb. Rev. Stat. §48-1905 (1988).

[131] See, also, Health and Welfare Canada draft guidelines, *supra*, note 73, §3.2.3, at 5.

[132] Privacy Commissioner of Canada, *supra*, note 1, at 15-20.

[133] Chen, Kim and True, *supra*, note 90, at 673.

[134] Conn. Gen. Stat. Ann. §31-51W(a) (West Supp. 1991). See discussion in Cairns and Grady, *supra*, note 1, at 523.

[135] R.I. Gen. Laws, *supra*, note 74, §28-6.5-1(B).

employees who provide a urine sample. Similarly, the State of Montana[136] stipulates that employers must ensure that blood and urine specimens are collected in a manner that "minimizes invasion of personal privacy" of the employee.[137]

Urinalysis is also considered to be extremely intrusive because of its capacity to reveal a wealth of information about an individual's private life. The chemical testing of bodily fluids extracts a whole host of physiological information about an employee's lifestyle, personal habits and mental and physical health.[138] As previously mentioned, by analyzing the chemical compounds in urine, the employer can learn of various medical conditions of an employee, such as heart disease, epilepsy, schizophrenia and arthritis. A urine sample also reveals whether an employee is pregnant. A related privacy concern is the compelled disclosure of personal medical information. In order to minimize cross-reactions and the distortion of laboratory results, employees are generally required to reveal the prescription and non-prescription drugs that they have recently ingested. For instance, employees are required to disclose the medication they take for high blood pressure, diabetes, birth control and depression.[139] As Denenberg and Denenberg state, "[b]ecause it reaches into areas of life beyond the workplace, drug testing implies an unprecedented degree of control over non-work related activity".[140]

Many advocate that legislation be promulgated to ensure that such confidential information of an employee is protected in workplace testing. It is stated that an independent laboratory ought to conduct the testing and should solely provide management with the results of the test. The Minnesota drug and alcohol workplace testing legislation provides:

> 181.954.1. Privacy limitations. A laboratory may only disclose to the employer test result data regarding the presence or absence of drugs, alcohol, or their metabolites in a sample tested.[141]

As discussed earlier in this chapter, urinalysis does not measure impairment or intoxication on the job but rather detects metabolites and

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[136] *Supra*, note 83, at 39-2-304(2)(a).

[137] Health and Welfare Canada draft guidelines, *supra*, note 73, §3.2.5, at 5, provide that "[p]rocedures for collecting urine specimens shall allow for individual privacy".

[138] Chen, Kim and True, *supra*, note 90, at 662; Armingtun, *supra*, note 40, at 1041; Canadian Bar Association, *supra*, note 40, at 17; and Halbert, *supra*, note 37, at 715.

[139] Chen, Kim and True, *supra*, note 90, at 673.

[140] Denenberg and Denenberg, *supra*, note 9, ch. A, at 38.

[141] *Supra*, note 109. The U.S. Department and Health and Human Services has also developed guidelines to address privacy concerns.

traces from drugs that may have been ingested days or weeks before the urine sample is collected. For example, inhalation of marijuana one month prior to a urine test can produce a positive result. For other drugs such as cocaine, metabolites may be excreted for several days after the psychoactive effect of the drugs has dissipated. In other words, because of the lengthy excretion rates of detectable drug metabolites in urine, urinalysis opens a "chemical-window" to off-the-job conduct.[142] As a New Jersey court states:[143]

> We would be appalled at the spectre of police spying on employees during their free time and then reporting their activities to their employers. Drug testing is a form of surveillance, albeit a technological one. Nonetheless, it reports on a person's off-duty activities just as surely as someone had been present and watching. It is George Orwell's 'Big Brother' Society come to life.

Workplace testing for alcohol and drugs also raises serious questions about the confidentiality of test results.[144] A person's reputation in the workplace as well as in the larger community can undoubtedly be damaged by the careless or malicious use of testing data.

It is clear that the *Freedom of Information and Protection of Privacy Act*[145] does not provide adequate protection to employees concerning confidential information obtained by management from drug and alcohol testing. As stated in the recently released publication of the Information and Privacy Commissioner,[146] legislation is needed specifically to address the privacy issues which emanate from workplace testing. Of particular concern is section 42 of the *Freedom of Information and Protection of Privacy Act* which delineates the circumstances in which information can be disclosed. Section 42(c) provides:

> 42. An institution shall not disclose personal information in its custody or under its control except,
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> . . . .
>
> (c) for the purpose for which it was obtained or compiled or for a consistent purpose[.]

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[142] Chen, Kim and Tran, *supra*, note 90, at 674.

[143] *Capua v. City of Plainfield*, 643 F. Supp. 1507, at 1511 (D.N.J. 1986).

[144] Halbert, *supra*, note 37, at 715; and Rothstein, *supra*, note 47, at 424.

[145] R.S.O. 1990, c. F-31.

[146] *Supra*, note 1.

According to section 43 of the Act, a purpose is consistent if the individual who had the information collected from him or her "might reasonably have expected such a ... disclosure". The possible breadth of the "consistent purpose" provision has led observers to conclude that the Act may not prevent confidential information obtained from a workplace drug test from being disclosed to a third party. In addition, it is important to understand that the Act is limited to public sector employees. The Act solely applies to an "institution"[147] which is defined as "(a) a ministry of the government of Ontario, and (b) any agency, board, commission, corporation or other body designated as an institution in the regulations". Thus, the Act offers no protection to private sector employees. Similar concerns with respect to the federal *Privacy Act*[148] prompted the Privacy Commissioner of Canada to make several recommendations in a publication entitled *Drug Testing and Privacy*.[149]

It is suggested that strict guidelines ought to be imposed on employers to ensure the confidentiality of test results. Many endorse the provisions in existence in Minnesota[150] and Vermont[151] which prohibit employers and laboratories from disclosing test results to a third party without the written consent of the employee or job applicant. The State of Iowa[152] requires management, at the time an employee leaves his employment, to destroy any record of drug or alcohol use if the employee has successfully completed a substance abuse program.

9. CONCLUSION

As this chapter illustrates, chemical testing of employees raises significant privacy issues including the forced extraction of bodily fluids, compelled disclosure of intimate personal information, surveillance of off-the-job conduct and dissemination of test results to third parties. In addition, these testing techniques are not capable of discerning either the past or present impairment of a worker. Thus, the relationship between drug test results and job performance must be seriously questioned. Furthermore, the reliability of test results currently conducted on employees must be critically examined as there is evidence that many employers do not subject screening test results to confirmation testing, do not follow strict chain of custody

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147 See s. 2(b) of the Act.

148 *Privacy Act*, R.S.C. 1985, c. P-21.

149 *Supra*, note 1.

150 *Supra*, note 109, §181.954.2.

151 *Supra*, note 74, §516(b).

152 *Supra*, note 108, §730.5.8.

procedures and may have poorly qualified laboratory technicians performing the tests in uncertified laboratories.

CHAPTER 3

COMMON LAW RIGHTS AND REMEDIES

1. INTRODUCTION

Unlike several American states, no legislation exists in Ontario which specifically addresses the issue of drug and alcohol testing in the workplace.[1] Neither the *Employment Standards Act*[2] nor the *Occupational Health and Safety Act*[3] specifies whether substance abuse testing is permitted, and if so, under what circumstances. For the vast majority of employees in Ontario, who are not unionized,[4] and who consequently have no formal grievance procedure to challenge mandatory testing, this means that traditional common law actions will be resorted to in order to delineate the circumstances, if any, in which drug and alcohol testing is permissible.

In this chapter, the Commission will discuss some of the contractual and tortious actions available to employees to challenge testing programs that have been imposed on them by their respective employers. In particular, the Commission will briefly examine actions in wrongful dismissal, defamation, intentional infliction of mental suffering, battery and negligence. As this analysis will demonstrate, common law actions are not an effective means of addressing the concerns of employees who have been subjected to mandatory testing. The common law actions are of limited application in the context of workplace testing. Moreover, in circumstances in which an employee is successful in her lawsuit, the remedies available are generally unsatisfactory or ineffective. This has been the experience of employees in the United

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[1] See Information and Privacy Commissioner/Ontario, *Workplace Privacy[:] A Consultation Paper* (Toronto: June 1992), at 40.

[2] R.S.O. 1990, c. E.14. This Act governs employees generally in Ontario.

[3] R.S.O. 1990, c. O.1.

[4] Approximately only a third of the Ontario workforce is unionized. See A.E. Robinson, "Drug Use Testing: The Canadian Scene": (1989), 34 J. Forensic Sci. 1422, at 1426.

States who have initiated common law actions against their employers in response to mandatory testing programs.[5]

2. WRONGFUL DISMISSAL

An employee who has been dismissed from employment either for refusing to submit to a drug and alcohol test or for testing positive on such test, may attempt to seek relief on the grounds of wrongful dismissal. A claim for wrongful dismissal is a common law action based on the existence of an employment contract, the terms of which may be express or implied.[6] In the absence of express terms to the contrary, an employee may be dismissed upon being given reasonable notice,[7] unless just cause exists for summary dismissal.

(a) Constructive Dismissal

Constructive dismissal arises in circumstances where an employer unilaterally alters a fundamental term of the employment contract. In the absence of reasonable notice, an employer has no right to require an employee to accept a unilateral change, or alternatively, to resign. The employee has the option of either refusing to accept the proposed variation or she may accept the unilateral change, expressly or impliedly. In cases in which an employee refuses to accept the variation and the employer persists in implementing the unilateral change, the employee may treat the persistence as a breach of contract and sue the employer for damages for reasonable notice.[8]

The issue of constructive dismissal could arise if an employer attempts to unilaterally impose a mandatory testing program on his employees without their express agreement. The question of what constitutes a fundamental term or condition of the employment contract is one of fact which will vary from case to case. Although the courts have not yet addressed the issue, a

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[5] A.E. Denenberg, "Corporate Drug Testing: Private Employers' Right to Test" (1987), 12 Del. J. Corp. L. 951, at 973; M. Wight, "State Drug Testing Statutes: Legislative Attempts to Balance Privacy and Productivity" (1989), 14 J. Corp. L. 721, at 753; and A. Sanders, "Intoxication and the Law: Drug Testing in the Workplace", [1987] Ann. Surv. Am. L. 167, at 184-85.

[6] See, generally, D. Harris, *Wrongful Dismissal* (Don Mills, Ont.: Richard De Boo, 1992, looseleaf).

[7] Payment may be given in lieu of reasonable notice. See *Carter v. Bell & Sons (Canada) Ltd.*, [1936] O.R. 290, at 297, [1936] 2 D.L.R. 438, at 440 (C.A.).

[8] E.E. Mole, *The Wrongful Dismissal Handbook* (Toronto: Butterworths, 1990), at 18. See *Hill v. Peter Gorman Ltd.* (1957), 9 D.L.R. (2d) 124 (Ont. C.A.).

strong argument could be made that the unilateral imposition of mandatory testing for psychoactive substances constitutes a fundamental change sufficient to justify a claim of constructive dismissal.

It is important to understand that the remedy for a successful wrongful dismissal action is limited to damages. As previously mentioned, an employee who has been dismissed without just cause is entitled to reasonable notice;[9] thus the measure of damages generally awarded by the courts is the income the employee would have earned for the duration of the notice period. An employee who has been wrongfully dismissed will not be entitled to be reinstated at common law.[10]

(b) Just Cause

(i) Insubordination

An employer is entitled to summarily dismiss without notice an employee who has been guilty of serious misconduct, habitual neglect of duty, incompetence, conduct incompatible with his duties or conduct prejudicial to the employer's business. Just cause may also exist when an employee has wilfully disobeyed his employer's orders in matters of substance.[11] The onus lies on the employer to prove the existence of just cause on a balance of probabilities.[12]

The grounds of disobedience or insubordination may be pleaded as just cause in the context of mandatory testing where an employee refuses to undergo a drug test when ordered to do so by his employer. However, in order for this defence to succeed, the employer must satisfy the court that the act of disobedience was so serious that the employee ought to be considered to have repudiated an essential term of the contract. In addition, the employer must establish that his request was "lawful[13] and reasonable",[14] unless the employee expressly agreed to be bound by the particular rule. The courts will likely scrutinize the reliability of the testing technology, as well as assess whether there were grounds to suspect that the employee was abusing drugs or alcohol. Furthermore, matters such as whether the employee is working in a "safety-sensitive" position and whether

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[9] 20 C.E.D. (Ont. 3rd) Title 90, ¶131; and Mole, *supra*, note 8, at 81.

[10] C.E.D., *supra*, Title 90, ¶74.

[11] Harris, *supra*, note 6, at §3.12, at 3-103; and Mole, *supra*, note 8, at 41.

[12] Harris, *supra*, note 6, at §3.10, at 3-101; and Mole, *supra*, note 8, at 36.

[13] See chs. 5 and 6 of this Report.

[14] Harris, *supra*, note 6, §3.11, at 3-103.

substance abuse programs, such as employee assistance programs, are effective alternatives to mandatory testing, will likely be examined by a court in determining whether an employer's request to submit to a drug test is reasonable.

(ii) Intoxication

An employee who has been discharged for testing positive on a drug or alcohol test may institute an action for wrongful dismissal. In such circumstances, the employer may argue that a positive test result is just cause for dismissal as it is evidence of intoxication.

It is well established in the case law that intoxication alone does not constitute sufficient grounds for dismissal; the employer must also demonstrate that the employee's job performance was clearly affected.[15] For example, in *Johnston v. Algoma Steel Corp.*,[16] the employer dismissed the plaintiff as the employee exhibited signs of alcohol consumption at work. As a result, the employee instituted an action for wrongful dismissal. In finding for the plaintiff, the Ontario Supreme Court stated that if "Algoma was purporting to fire Johnston for having the smell of alcohol on his breath while on duty, such conduct would not justify termination for cause, unless the consumption of alcohol affected his ability to perform his job".[17]

As mentioned, an employer has just cause for dismissal if the employee's intoxicated condition impairs his ability to perform his work. However, an employer will encounter serious difficulty in establishing this ground of dismissal if the results of a urine test are the sole proof of impairment. The discussion in chapter 2 clearly demonstrates that urinalysis, as well as other testing techniques, do not establish impairment nor are they capable of detecting the time at which a drug was ingested. Therefore, management will likely not be able to successfully argue that it had just cause for dismissal on grounds of intoxication simply because the employee tested positive on a urine, blood, or saliva test.

It is also important to note that off-the-job conduct, including criminal conduct, will not constitute just cause for dismissal unless it can be demonstrated that the employee's conduct was prejudicial to the employer's

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[15] *Ibid.*, §3.14, at 3-115.

[16] (1989), 24 C.C.E.L. 1, 89 C.L.L.C. §14,012 (Ont. H.C.J.) (subsequent references are to 24 C.C.E.L.).

[17] *Ibid.*, at 9-10.

business interests. For example, in *Rhodes v. Zehrman Ltd.*,[18] the plaintiff, after working hours, had purchased marijuana from a co-worker and had smoked it. The Ontario Divisional Court held that the employer did not have just cause to discharge the plaintiff as there was no evidence that the employee's conduct was prejudicial to the employer's reputation. Similarly, in the Nova Scotia case *Backman v. Hyundai Auto Canada Inc.*,[19] the plaintiff had been discharged from his position as regional sales manager for the reason that criminal charges of trafficking in narcotics had been laid against him. Although the defendant company was of the opinion that the employee was innocent of the criminal acts, it nevertheless dismissed the employee in order to avoid adverse media publicity. The Nova Scotia Court held that the plaintiff had been wrongfully dismissed – the Court was not convinced that because of the criminal charges, customers refused to continue to conduct business with the defendant.[20]

The above discussion demonstrates that an employer may dismiss an employee upon reasonable notice or payment in lieu of reasonable notice. In cases where an employee is successful in an action for wrongful dismissal, either for refusing to submit to a drug or alcohol test or for testing positive on such tests, the remedies available to the employee will generally be unsatisfactory. The damages which a court will generally award are limited to the income the employee would have earned during the notice period; an employee who has been wrongfully dismissed will not be reinstated to his job.

3. DEFAMATION

An action in defamation may be instituted against a party who has disclosed to a third person the positive results of an employee's drug or alcohol test or who has asserted that the employee is a drug addict or alcoholic. In the context of workplace testing, the defendants in such a lawsuit could include an employer, a co-worker, a laboratory or a physician.[21]

The law of defamation seeks to protect the good reputation of individuals from false statements that adversely reflect upon their reputation

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[18] (1986), 15 C.C.E.L. 137 (Ont. Div. Ct.).

[19] (1990), 100 N.S.R. (2d) 24, 33 C.C.E.L. 300 (N.S.S.C., T.D.) (subsequent references are to 33 C.C.E.L.).

[20] *Ibid.*, at 312-14.

[21] See R.T. Chamberlain, "Legal Considerations in Drug Use Testing: Privacy Rights, Contracts, and Wrongful Use of Test Results" (1989), 34 J. Forensic Sci. 1477, at 1480.

in the community.[22] The law considers a person's reputation to be worthy of protection for two essential reasons – an individual's good name has dignitary value as well as economic worth.[23] Although articulating a precise definition of defamation has proved difficult for both courts and commentators, a statement is considered to be defamatory if:[24]

> it lowers the reputation of the plaintiff in the estimation of right-thinking members of society, that is, if it has a tendency to or does injure, prejudice or disparage the plaintiff in the eyes of others, or lowers the good opinion, esteem or regard which others have for him, or causes him to be shunned and avoided, or exposes him to hatred, contempt or ridicule.

The onus of establishing that a statement is defamatory lies on the plaintiff. However, the Supreme Court of Canada has held that the law of defamation has a low threshold over which a statement will be considered to be defamatory.[25] In order to establish a *prima facie* case, the plaintiff need not prove that the statement was false nor that it was made maliciously. Once the plaintiff has satisfied the court that the statement is defamatory and that the defendant has communicated it to a person other than the plaintiff,[26] the law presumes that the words are false unless the defendant proves otherwise.[27] Applying those principles to workplace testing, a statement to a third party that an employee is an alcoholic or drug addict would likely be considered by a court to be *prima facie* defamatory.

It is important to note that every participant in the publication of the defamatory remark may incur liability, including those responsible for its dissemination.[28] When the party involved in the publication of the

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[22] See, generally, R.E. Brown, *The Law Of Defamation in Canada* (Toronto: Carswell, 1987); P. Lewis (ed.), *Gatley on Libel and Slander* (8th ed.) (London: Sweet & Maxwell, 1981); and J.S. Williams, *The Law of Libel and Slander in Canada* (2nd ed., (Toronto: Butterworths, 1988).

[23] A.M. Linden, *Canadian Tort Law* (4th ed.) (Toronto: Butterworths, 1988), at 627.

[24] Brown, *supra*, note 22, Vol. 1, at 38.

[25] *Cherneskey v. Armadale Publishers Limited*, [1979] 1 S.C.R. 1067, at 1095, 90 D.L.R. (3d) 321, at 342.

[26] In order to be actionable, a defamatory remark must be communicated to a third person other than the defamed individual. If the defendant intended that someone should hear the defamatory statement, he may incur liability. However, if the defendant did not intend the remarks to be communicated and could not by the exercise of reasonable care have avoided the communication, the defendant will not be liable. See Linden, *supra*, note 23, at 644.

[27] Brown, *supra*, note 22, Vol. 1, at 366; and Lewis, *supra*, note 22, §§4 and 5, at 5.

[28] Linden, *supra*, note 23, at 645.

defamatory statement is an employee, the principle of *respondeat superior* applies to the statements provided that the remarks were made within the scope of the employment.[29]

(a) Defences to a Defamatory Action

Once the plaintiff has established a *prima facie* case, the onus shifts to the defendant to prove a defence to the claim of defamation. In the workplace setting, the most relevant defences appear to be justification and privilege.

(i) Justification

Truth is a complete defence to an action for defamation.[30] In order to establish this defence, the defendant must prove the literal truth of the words as well as the truth of innuendo or the inferential meaning of the words.[31] It is not sufficient for the defendant to show that the statement was published with honest belief in its truth based on reliable information.[32] Applying these principles to workplace testing, an employer would likely not succeed in a defence of justification if he merely established that he relied on a reputable laboratory to perform the testing and that he honestly believed the results were accurate, when in actual fact, the test results proved to be erroneous. In addition, where a defendant makes an imputation that is general in nature, such as an allegation of general bad character or an assertion that particular conduct has occurred on several occasions, the defence of justification will not be established by merely proving a single instance of such conduct.[33] In other words, where the defamatory statement is to the effect that the employee is a chronic drug abuser, it may not suffice to establish that a single urine or blood test indicated drug use. Evidence of a pattern of conduct is necessary in order for the defence of justification to succeed in such circumstances.

The standard of proof which must be satisfied by the defendant is the civil standard of a balance of probabilities.[34] However, the burden may be

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[29] *Ibid.*, at 643.

[30] Brown, *supra*, note 22, Vol. 1, at 361; Linden, *supra*, note 23, at 649; and Lewis, *supra*, note 23, §351, at 150.

[31] Linden, *supra*, note 23, at 649.

[32] Lewis, *supra*, note 22, §352, at 158.

[33] Brown, *supra*, note 22, Vol. 1, at 361; and Lewis, *supra*, note 22, Vol. 1, at 152.

[34] Brown, *supra*, note 22, Vol. 1, at 385.

more onerous in cases in which a criminal act is impugned as, for example, a statement that the employee traffics in narcotics.[35]

(ii) Qualified Privilege

A defendant in a defamatory action may be successful in persuading a court that the statements, although false and defamatory, are privileged.[36] Qualified privilege is defined in *The Law of Defamation in Canada*:[37]

> A statement is made on a privileged occasion if it is fairly made by a person in the discharge of some public or private duty, or for the purpose of pursuing or protecting some private interest, provided that it is made to a person who has some corresponding interest in it. The duty may be either legal, social or moral. The test is whether persons of ordinary intelligence and moral principle, or the great majority of right-minded persons, would have considered it a duty to communicate the information to those to whom it was published.

In other words, a qualified privilege exists when the person who makes the statement "has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it".[38] In cases where the defendant establishes that the statement, although false, was made on a privileged occasion, the defence will succeed unless it is shown that the defendant published the statement with actual or express malice or with an indirect or improper motive.[39]

In the context of workplace drug and alcohol testing, an employer may be able to successfully defend a defamatory action on the grounds of qualified privilege. Where statements are made to a prospective employer by a former employer concerning the discharge of an employee for alcohol or drug use, the statements may be considered by a court to be privileged. It could be argued that the previous employer had a moral or social duty to

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[35] See discussion in Brown, *ibid.*, at 365-66.

[36] There are two types of privileged defamatory statements, absolute and qualified. Absolute privilege is a defence based on grounds of public policy. It applies to situations in which the law deems society's interests to be best served by the fullest dissemination of information even at the expense of an individual's reputation. The defence is limited to circumstances which involve the efficient functioning of the legislature, executive and judiciary. For example, absolute privilege attaches to statements made in the course of parliamentary, judicial and quasi-judicial proceedings. See Linden, *supra*, note 23, at 650-53.

[37] Brown, *supra*, note 22, Vol. 1, at 465.

[38] Linden, *supra*, note 23, at 654, quoting *Adam v. Ward*, [1917] A.C. 309, at 334 (H.L.).

[39] Linden, *supra*, note 23, at 662.

disclose, and the prospective employer had a corresponding interest in receiving the details of the grounds for termination. Similarly, a court may find a requisite duty and the corresponding interest where a statement concerning drug or alcohol consumption of an employee is made by a laboratory or a physician to an employer. Moreover, the defence of qualified privilege may succeed in cases in which an employer discloses to his employees the reasons for the discharge of the plaintiff.[40] The defence may contend that such disclosure was in furtherance of the employer's legitimate interest in deterring similar conduct, and that the employees had a corresponding interest in knowing the grounds for possible disciplinary action.

A defendant who successfully establishes a claim of qualified privilege may nevertheless lose the benefit of the privilege by exceeding it, either by communicating the defamatory statement to persons not permitted to receive the information,[41] or by disclosing information beyond which that person is entitled to receive.[42] For instance, a laboratory may lose its privilege if it communicates personal information to an employer concerning an employee – for example, that the employee is pregnant – information which laboratory has obtained as a result of conducting a blood or urine test.

(b) Conclusion

It is well recognized that defamatory actions are procedurally complex, extremely technical and costly to litigate.[43] Moreover, one ought to be cognizant of the fact that damage awards in defamatory actions in Canada tend to be very modest, particularly when balanced against the costs of such litigation.[44] As an Ontario lawyer observes, "given the level of damage awards that recent cases demonstrate, and the risks and difficulties of libel actions, very few actions in this country can be considered to be economic".[45] Thus, even in circumstances where an employee has a strong substantive action, she may be extremely reluctant to exhaust this legal

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[40] Lewis, *supra*, note 22, §505, at 213; and Brown, *supra*, note 22, Vol. 1, at 485.

[41] G.H.L. Fridman, *The Law of Torts in Canada*, Vol. 2 (Toronto: Carswell, 1990), at 175-76.

[42] Linden, *supra*, note 23, at 654-55.

[43] Cherniak and Duffy, "Remedies Following Publication or Broadcast" (1989) (unpublished address to the Institute of Continuing Legal Education), at 15.

[44] For examples of recent damage awards, see Brown, *supra*, note 22, Vol. 2, Appendix 2.

[45] Cherniak and Duffy, *supra*, note 43, at 15.

remedy because of the great expense in instituting an action in defamation.[46]

4. BATTERY

One can conceive of situations in which some forms of drug and alcohol testing may give rise to an action in battery.[47] The tort of battery is defined as "any intentional nonconsensual touching which is harmful or offensive to a person's reasonable sense of dignity".[48] The purpose of an action in battery is to protect individuals from interference with their bodily security and integrity.[49] It is important to note that actual physical harm is not a requisite element of the tort of battery – contact offensive to the plaintiff's sense of dignity need merely be established.[50]

Some forms of testing, such as extracting blood samples from employees, involve physical contact. This is in contrast to urinalysis where it would be difficult to argue that the mere passive observation of the process

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[46] Note that in the United States, some employees have been successful in actions which they have instituted against their employers for defamation in the context of workplace testing. For instance, in *Houston Belt & Terminal Railway Co. v. Wherry*, 548 S.W. 2d 743 (Tex. Ct. App. 1977); cert. den. U.S. 962n (1977), an employee was awarded $150,000 compensatory and $50,000 punitive damages based on an inaccurate letter which the employer had sent to the State Department of Labor. The letter stated that because the employee had "traces of methadone" in his system, the employee had been discharged for contravening a company rule which prohibited the use of narcotics. Further testing revealed that although the employee's urine did contain a compound whose characteristics were similar to methadone, the substance was not, in fact, methadone. See D.G. Evans, *Drug Testing Law, Technology and Practice* (New York: Clark/Boardman/Callaghan, 1990, looseleaf), §3:04, at 11; K.M. Dubowski and R.S. Tuggle III, *Drug-Use Testing in the Workplace: Law and Science* (Eau Claire, Wis.: PESI, 1990), §§1.33, §4.6; J.R. Mooney and D.L. Neigus, "The Problems of Drug Testing in the Private Workplace" (1991), 37 Prac. Law. 57, at 62-63; M.R. O'Donnell, "Employee Drug Testing – Balancing the Interests in the Workplace: A Reasonable Suspicion Standard" (1988), 74 Va. L. Rev. 969, at 984; J.R. Redeker and J.A. Segal, "How To Protect Employers Who Test for Drug and Alcohol Abuse" (1987), 33 Prac. Law. 13, at 21; and J.R. Lewis, "Drug Testing in the Workplace: Legal and Policy Implications for Employers and Employees", [1987] Detroit C.L. Rev. 659, at 719-20.

[47] *Report of the Canadian Bar Association-Ontario Committee to Study the Implications of Mandatory Drug Testing in the Workplace* (July 1987), at 26.

[48] *Malone v. Shulman* (1990), 72 O.R. (2d) 417, at 423, 67 D.L.R. (4th) 321, at 327, (C.A.). See, also, Linden, *supra*, note 23, at 40.

[49] Linden, *ibid*, at 40-41.

[50] Fridman, *supra*, note 41, Vol. 1 (1989), at 44.

of voiding, although offensive to an employee's sense of dignity, constitutes a battery as there is no physical contact.[51]

Consent constitutes a valid defence to the tort of battery.[52] Undoubtedly, an employer defending a battery action will contend that an employee who willingly provides a blood sample has consented to the procedure and thus should fail in her action. Although case law establishes that consent procured by force or threat of force will not provide a defence to battery,[53] mere economic duress is not sufficient to obliterate an otherwise valid consent.[54] Thus, an employee who has been threatened with the loss of her job for failing to comply with a drug test may not be able to successfully argue that her consent was vitiated by duress.

5. INTENTIONAL INFLICTION OF MENTAL SUFFERING

The tort of intentional infliction of mental suffering protects individuals against severe emotional distress intentionally caused by others.[55] To establish a defendant's liability, the plaintiff must prove that: (1) the defendant intentionally committed an act, either physical or verbal; (2) the act was intended to cause physical harm;[56] and (3) actual physical harm resulted amounting to a visible and provable illness.[57] In addition, courts have required that a fourth element be established, namely, that the defendant's conduct was outrageous and flagrant. The distinction between outrageous conduct and a mere insult is discussed in *Rahemtulla v. Vanfed Credit Union*:[58]

> While this distinction appears not to have been expressly adopted in the Canadian and Commonwealth cases, the conduct considered in the leading authorities ... was in fact flagrant and extreme. Moreover, it is difficult to accept that the courts should protect persons from every practical joke or unkind comment.

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[51] R. Solomon, *Employment Drug Testing and Employment Assistance Programs: Legal Rights, Obligations and Liabilities* (London, Ont: 1988) (unpublished manuscript), at 154.

[52] Fridman, *supra*, note 41, Vol. 1 (1989) at 63.

[53] Linden, *supra*, note 23, at 63.

[54] *Ibid.*; and Solomon, *supra*, note 51, at 156-57.

[55] Linden, *supra*, note 23, at 50.

[56] This element of the tort was established in *Wilkinson v. Downton*, [1897] 2 Q.B. 57, [1895-7] All E.R. Rep. 267.

[57] Linden, *supra*, note 23, at 50.

[58] (1984), 51 B.C.L.R. 260, at 265, [1984] 3 W.W.R. 296, at 302 (S.C.).

> Assuming, therefore, that only flagrant and extreme conduct inflicting mental suffering is actionable, the question is whether the defendant's conduct can be so described. In my view, it can.

In *Rahemtulla*, an employer, who had accused the plaintiff employee of stealing funds and who consequently, terminated her employment, was found liable for the intentional infliction of mental suffering.[39]

It may be difficult to establish the constituent elements of this tort. In the context of mandatory drug and alcohol testing in the workplace, irrespective of which testing technique is used, it will be difficult to convince a court that an employer intended to cause physical harm to an employee by subjecting her to testing. Furthermore, it will be difficult for the plaintiff to establish that actual physical harm ensued as a result of submitting to a drug test – mere embarrassment or emotional distress unaccompanied by physical symptoms will not suffice.

6. NEGLIGENCE

An employee who has been subjected to testing may institute an action in negligence against a laboratory or employer. In cases where testing is performed in substandard laboratories, chain of custody procedures are not followed, or the technicians who conduct the tests are not properly qualified, liability may be imposed on a laboratory or an employer.

In order to be successful in a negligence action, it must be established that the defendant owed the plaintiff a duty of care, that harm ensued as a result of the conduct of the defendant and that the harm was foreseeable[40]. In the context of workplace testing, the employee may be able to successfully argue that the person who mandated the tests – the employer – and the party which conducted the test – the laboratory – owe a duty of care to the test subjects. As Evans states in *Drug Testing Law, Technology and Practice*,

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[39] In the U.S. case, *Luck v. Southern Pacific Transportation Company*, 267 Cal. Rptr. 618 (Cal. App. 1 Dist. 1990), a computer programmer who had been discharged for refusing to submit to a drug test was awarded a large jury verdict, in part, for the infliction of emotional distress. Also, in *Kelley v. Schlumberger Technology Corporation*, 849 F.2d 41 (1st Cir. 1988), an oil rig worker was awarded $125,000 in damages in an action against his employer for the negligent infliction of emotional harm. The employee had been discharged after a urine test indicated that there was marijuana in his system. Although the employee admitted that he had used marijuana several days prior to the test, the conduct was off company premises during off-duty hours. See Evans, *supra*, note 46, §3:07, at 10-19; S.S. Cairns and C.V. Grady, "Drug Testing in the Workplace: A Reasoned Approach for Private Employers" (1990), 12 Geo. Mason U.L. Rev. 691, at 732-33; and Lewis, *supra*, note 46, at 726.

[40] Lindsay, *supra*, note 23, at 88.

"employers, as well as those performing tests, owe a duty of reasonable care to employees for the collection, maintenance, storage, analysis and reporting of the results of the drug test".[61] Moreover, a worker may have little difficulty in proving that harm, for example, disciplinary measures or termination of employment, ensued as a result of the testing. Thus, an employee who has been subjected to a drug or alcohol test that is inaccurate, unreliable, or incomplete, may be successful in an action in negligence against his employer as well as against the laboratory which conducted the test.

7. CONCLUSION

As the discussion in this chapter demonstrates, the contractual and tortious actions available to employees who have been subjected to mandatory testing are not an effective means of challenging testing programs imposed on them by their employers.[62] Either the actions are extremely difficult to establish in the context of workplace testing or the remedies do not provide employees with adequate compensation. As Wight observes, "traditional common-law remedies largely have been ineffective in resolving tensions between proponents and opponents of private sector testing".[63] It is for this reason that many advocate that the Ontario Legislature immediately address its attention to this issue and delineate the circumstances in which testing is permitted as well as the procedures that must be followed by employers who wish to introduce testing programs into their respective workplaces. This is considered to be of particular importance to private sector employees who, as chapter 5 will demonstrate, are precluded from challenging these programs under the *Canadian Charter of Rights and Freedoms*.[64]

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[61] *Supra*, note 46, §3:03, at 7.

[62] As discussed in ch. 2 of this Report, the process of testing for psychoactive substances can be highly intrusive of a person's privacy both in the manner in which the test is conducted and in the information that is disclosed. However, unlike the United States (see Ewan, *ibid.*, §3:02, at 5-6; *O'Brien v. Papa Gino's of America, Inc.*, 780 F.2d 1067 (1st Cir. 1986); *Kelley v. Schlumberger Technology Corporation*, *supra*, note 59; and *Luck v. Southern Pacific Transportation Company*, *supra*, note 59), Canadian courts have shown a reluctance to recognize a distinct cause of action based on the right to privacy. As the Supreme Court of Canada states in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, privacy is protected by such torts as assault, defamation and trespass.

[63] *Supra*, note 5, at 753. See, also, P.J.J. Cavalluzzo and K. Schachter, *The Charter and Human Rights in the Workplace: Are They Working? Drug Testing in the Workplace* (Canadian Bar Association - Ontario, 1991 Institute of Continuing Legal Education, January 1991), at 29-30; and Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: 1990), at 19.

[64] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, c. 11 (U.K.).

CHAPTER 4

THE UNIONIZED WORKPLACE

1. INTRODUCTION

The Ontario *Labour Relations Act*,[1] which governs the law of collective bargaining in this province, does not address the issue of substance abuse testing in the unionized workplace. Without guidance from the Legislature, arbitrators have recently been compelled to grapple with this highly difficult and controversial issue.

There are generally two circumstances in which a unionized employee may be subjected to drug and alcohol testing. First, workplace testing may be negotiated by the union and management and provided for in the collective agreement. However, it is rare for an Ontario collective agreement to contain provisions on mandatory testing, as unions are vehemently opposed to introducing what they perceive to be invasive measures into the workplace. In situations where the collective agreement is silent on the issue of testing, management may attempt unilaterally to impose a mandatory testing program.[2]

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[1] R.S.O. 1990, c. L.2.

[2] See C.G. Palmer and B.W. Burkett, *Mandatory Testing and Other Responses to Drugs and AIDS in the Workplace* (1988) (paper prepared for the Canadian Bar Association - Ontario), at 10; *Report of the Canadian Bar Association-Ontario Committee to Study the Implications of Mandatory Drug Testing in the Workplace* (July 1987), at 21; S. Chapnik, "Mandatory Drug Testing In The Workplace" (1989), 5 Admin. L.J. 102, at 106; and K. Von Rosenberg, "Mandatory Drug and Alcohol Testing" (1989), 6 Hum. & L. 9, at 10.

Note that in the United States, drug testing programs are considered mandatory subjects of bargaining under the *National Labor Relations Act*, 29 U.S.C. §158(a), (b)(3) and (d). The National Labor Relations Board has held, in such decisions as *Johnson-Bateman Co. v. International Association of Machinists, Local 1047*, 295 N.L.R.B. 26 (1989), that an employer has the obligation to bargain over the imposition of a drug testing program respecting current employees. The Board concluded that the implementation of a testing program constitutes a material change in the conditions of employment. The Board also stated that a union, by agreeing to a broadly worded management clause and by acquiescing to the past practice of annual medical examinations, does not waive its right to require bargaining with respect to drug testing. However, the National Labor Relations Board has decided, in such cases as *Minneapolis Star-Tribune*, 295 N.L.R.B. 63 (1989), that pre-employment drug and alcohol testing does not constitute a mandatory subject of bargaining as job applicants are not "employees"

Arbitral jurisprudence has developed strict conditions which an employer must satisfy in order for a unilateral rule to be enforceable. In the landmark decision of *Re Lumber & Sawmill Worker's Union, Local 2537 and KVP Co. Ltd.*,[3] the Board held that a rule unilaterally imposed by management will only be enforceable if it meets the following criteria:

1. It must not be inconsistent with the collective agreement.

2. It must not be unreasonable.

3. It must be clear and unequivocal.

4. It must be brought to the attention of the employee affected before the company can act on it.

5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.

6. Such rule must have been consistently enforced by the company from the time it was introduced.

Management rules which do not satisfy the conditions enumerated in *KVP Co. Ltd.* can be challenged by either a union policy grievance or by an individual grievance filed by an employee.

It is important to understand that a prospective employee or a union on behalf of such an individual is not entitled to submit a complaint to labour arbitration. Consequently, a unilaterally imposed testing program for job applicants, or a management decision not to hire a particular individual on the ground that the person refused to submit to testing, cannot constitute a basis for a grievance.[4] It is for this reason that many urge that legislative

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within the meaning of the National Labor Relations Act. See K.M. Dubowski and R.S. Tuggle III, *Drug-Use Testing in the Workplace: Law and Science* (Eau Claire, Wis.: PESI, 1990), §1.13, at 15-16; Committee on Labor and Employment Law, "Drug Testing In The Workplace" (1988), 43 A.B.N.Y.C. Record 447, at 464; A. Abbey and C. Redel, "Drug Testing in the Workplace: Public and Private Sector Employers and the Courts", [1991] Lab. L.J. 239, at 242-43; R.D. Hunt and T.J. Hurley, Jr., "Drug and Alcohol Testing in the Workplace" (1988), 17 Colo. Law. 457, at 458; and T.E. Ulrich, "A Drug-free American Workplace and the Virginia Employer" (1989), 15 Va. B.A.J. 5, at 6.

[3] (1965), 16 L.A.C. 73, at 85 (hereinafter referred to as "*KVP Co. Ltd.*").

[4] M. Pinsonneault, *Medical Examination and Testing in the Workplace* (Toronto: 1991) (thesis submitted in conformity with the requirements of the LL.M. Degree, Faculty of Law, University of Toronto), at 205-06.

provisions be enacted to protect prospective employees in the context of workplace testing.[5]

An examination of the labour awards demonstrates that the privacy rights of employees are highly valued by arbitrators; management will not be permitted to encroach on the privacy rights of employees except in strictly delineated circumstances. As stated in *Re Monarch Fine Foods Co. Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647*:[6]

> It is well established that persons do not by virtue of their status as employees lose their right to privacy and integrity of the person. An employer could not at common law assert any inherent right to search an employee or subject an employee to a physical examination without consent: *Latter v. Braddell et al.* (1881), 50 L.J.Q.B. 448 (C.A.). Thus there is nothing that can be described as an inherent management right to subject an employee to what would otherwise be a trespass or an assault upon the person.

The Commission will discuss the standards imposed by arbitrators on employers who seek to introduce programs that interfere with the privacy of their employees. This issue will be examined in three contexts: physical searches and searches of the personal effects of an employee, medical examinations and, lastly, the emerging area of drug and alcohol testing.

2. WORKPLACE SEARCHES

The Ontario arbitration board in *Re Amalgamated Electric Corp. Ltd. (Markham) and International Brotherhood of Electrical Workers, Local 1590*[7] established important principles regarding the propriety of management to search the personal belongings of employees. The collective agreement governing the employees contained a standard management clause:

> [I]t is the exclusive function of the Company to
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> (a) maintain order, discipline and efficiency, and to make, alter and enforce reasonable rules and regulations to be observed by the employees.

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[5] B. Feldthusen, "Urinalysis Drug Testing: Just Say No" (1988), 5 Can. Hum. Rts. Y.B. 81, at 107; Finkelstein, *supra*, note 4, at 88, 98, 100 and 107; and M. Wight, "State Drug Testing Statutes: Legislative Attempts to Balance Privacy and Productivity" (1989), 14 J. Corp. L. 731, at 735.

[6] (1978), 20 L.A.C. (2d) 419 (Ont.), at 421 (hereinafter referred to as "*Re Monarch Fine Foods Co. Ltd.*").

[7] (1976), 6 L.A.C. (2d) 28 (Ont.), at 29.

In this particular case, the employees, as they were leaving the workplace, were requested to open their lunch pails, purses and parcels in order to permit the company to conduct a visual inspection of the contents of these items. In directing the company to discontinue its spot checks, the arbitration board stated that "[t]he preservation of the right to privacy with respect to personal effects ought to be jealously preserved".[8] The Board stated that management is only permitted to invade the privacy rights of an employee in the following two circumstances:[9]

1. if there is the clearest provision in the contract of employment or the collective agreement to the contrary; or

2. if there is a real and substantial suspicion that the individual is guilty of theft.

In support of its right to search the belongings of its employees, the company had argued that first, no direct compulsion had been used to compel the employees to submit to the search and, second, that discipline was not imposed on those who refused to comply with the request of the company. The Board responded to this argument in the following manner:[10]

> Even though employees may voice no objection to opening lunch pails for inspection the fact that they are requested by their superiors to do so tends to be a form of compulsion. If they were to insist on their rights of privacy, they may feel that they place themselves under suspicion of theft.

Another union grievance in which the invasion of employee privacy rights was challenged was *Re University Hospital and London & District Service Workers' Union, Local 220*[11]. The issues before the Board were whether management was entitled to inspect company lockers used by the employees, and if so, whether the inspection extended to the workers' personal effects. According to the facts of this case, the hospital had been experiencing a problem of food pilferage. Prior to the inspection, management had met with its employees and had asked their assistance in eliminating the problem. Although the collective agreement did not address the issue of locker inspections, the employee handbook did contain a

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[8] *Ibid.*, at 33.

[9] *Ibid.*, at 33.

[10] *Ibid.*, at 32. See, also, *Re United Automobile Workers, Local 444 and Chrysler Corp. of Canada Ltd.* (1961), 11 L.A.C. 152 (Ont.); and *Re Board of Governors of Riverdale Hospital and Canadian Union of Public Employees, Local 43* (1977), 14 L.A.C. (2d) 334 (Ont.).

[11] (1981), 28 L.A.C. (2d) 284 (Ont.).

provision to the effect that the hospital, at any time, had the right to search lockers used by the employees.[12]

In rendering its award, the Board stipulated that "[b]efore an employer can be justified in requiring that a locker be open to inspection, fairness and respect for privacy would dictate that an employer first have adequate cause".[13] The Board came to the conclusion that the company did have adequate cause to conduct the locker inspection as first, a pilferage problem did exist and, second, the hospital had exhausted other measures prior to resorting to the locker inspections. In addition, the employees had been put on notice by the provision in the handbook that their lockers could be inspected. A final reason given by the board for the reasonableness of the search was that the company did not engage in "discriminatory spot checks":[14]

> In contrast to what would happen in a spot check, no employee was singled out; therefore no single employee was put at risk of being suspected by others of having engaged in wrongdoing simply by the fact that he alone was asked to open his locker.

It is essential to observe that although the Board decided that the hospital had the right to inspect the lockers, it stated that management had no authority to inspect the personal effects in the employees' lockers.[15]

In *Re Lornex Mining Corporation Ltd. and United Steelworkers, Local 7619*,[16] the union filed a policy grievance challenging the right of the company to randomly search employees' lunch boxes. Workers who failed to cooperate were subject to immediate suspension without pay. In rendering its decision, the Board cited *KVP Co. Ltd.*[17] for the proposition that any rules or regulations promulgated by the company must be reasonable.[18] The arbitrators also stated that the reasonableness criterion is applicable not only to the rule itself but also with respect to the enforcement of the rule.[19]

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[12] *Ibid.*, at 299-300.

[13] *Ibid.*, at 301.

[14] *Ibid.*

[15] *Ibid.*

[16] (1983), 14 L.A.C. (3d) 169 (B.C.) (hereinafter referred to as "*Re Lornex Mining Corporation Ltd.*"). *Re Lornex Mining Corporation Ltd.* was cited with approval in *Re Provincial-American Truck Transporters and Teamsters Union, Local 880* (1991), 18 L.A.C. (4th) 412 (Ont.) (hereinafter referred to as "*Re Provincial-American Truck Transporters*").

[17] *Supra*, note 3.

[18] *Re Lornex Mining Corporation Ltd.*, *supra*, note 16, at 180.

[19] *Ibid.*, at 180.

In upholding the grievance, the Board criticized the company for arbitrarily singling out particular employees and placing them in a position of being perceived by their co-workers and supervisors as having engaged in wrongdoing.[20] The Board was of the view that random searching of employees' lunch boxes does not satisfy the test of "reasonableness":[21]

> In balancing the interest of the employer and the employee on this issue, it is not reasonable, in my judgment, to institute a set of rules and regulations which are arbitrary in the sense that the security guards who enforce the rule can do so at their whim in so far as the selection of any one or more employees for inspection is concerned. They ought to be given certain criteria for the selection process that not only avoids arbitrariness but also avoids any discrimination, the possibility of discrimination, or the perception of discrimination.

The Board also held that it was not "reasonable" for management to impose automatic suspension on any employee who refused to allow her personal belongings to be searched.[22] Prior to the imposition of disciplinary measures, it is incumbent on an employer to examine any mitigating factors such as length of service, personal history and previous disciplinary record – the company must apply its mind objectively to the facts in each case and assess the appropriate penalty having regard to all the circumstances.[23]

3. MEDICAL EXAMINATIONS

The general right of an employee not to be subjected to a medical examination is based on the common law guarantee against infringement upon the physical integrity of the person.[24] As is stated in *Re Shell Canada Products Ltd. and C.A.I.M.A.W., Local 12*:[25]

> [T]he general rule in such cases is that in the absence of an agreement or statutory authority, an employer is not entitled to require an employee to submit to an examination by a doctor of the employer's choice, or otherwise to compel the employee to disclose information about his own medical condition. That right is based on guarantees provided at common law against infringement upon the physical integrity of the person. Those laws take several different

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[20] *Ibid.*, at 103.

[21] *Ibid.*

[22] *Ibid.*, at 104.

[23] *Ibid.*

[24] *Re Thorgeson and Town of Oakville; Re Rankins and Town of Oakville* (1963), [1964] 1 O.R. 721, 41 D.L.R. (2d) 294 (H.C.J.).

[25] (1990), 14 L.A.C. (4th) 73 (B.C.), at 79.

forms but include prohibitions against such things as trespass against the person, assault, battery and unlawful confinement and they apply with equal force in the employment relationship. The employee does not leave those protections at the company gate.

In circumstances in which the employment relationship is governed by a collective agreement, management can require an employee to submit to a medical examination if (1) a statute specifically authorizes a medical examination;[36] or (2) the right to a medical examination is in the collective agreement, expressly or impliedly.[37]

It has been held in several decisions such as *Re Monarch Fine Foods Co. Ltd.*,[38] *Re Firestone Tire & Rubber Co. of Canada Ltd. and United Rubber Workers, Local 113*,[39] *Re Riverdale Hospital and Canadian Union of Public Employees, Local 79*,[40] and *Re Air Canada and Canadian Air Line Employees' Association*,[41] that a company has both the entitlement and the obligation to satisfy itself that its workers are fit to perform the tasks to which they are assigned. Arbitration boards have consistently held that it is implicit in the rights of management to ensure that employees are physically fit to perform their work safely and efficiently. Nevertheless, a rule unilaterally promulgated by an employer compelling its employees to submit to a medical examination must meet the test of reasonableness as prescribed by *KVP Co. Ltd.*[42] As the Board states in *Re Firestone*,[43] "[w]hat is proper will depend, in each case, on the nature of the work and the circumstances to which it is to be performed".

4. DRUG AND ALCOHOL TESTING

Labour arbitrators, confronted by the new issue of drug and alcohol testing, are beginning to articulate principles concerning the circumstances in which management rules on this issue will be held to be enforceable. In

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[36] See, for example, the *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.); and the *Atomic Energy Control Regulations*, C.R.C. 1978, c. 365. In Ontario, medical examinations are required of construction workers and miners.

[37] See discussion in D.J.M. Brown and D.M. Beatty, *Canadian Labour Arbitration* (3rd ed.) (Aurora, Ont.: Canada Law Book, 1991, looseleaf), at §7:3230.

[38] *Supra*, note 6.

[39] (1973), 3 L.A.C. (2d) 12 (Ont.) (hereinafter referred to as "*Re Firestone*").

[40] (1985), 19 L.A.C. (3d) 396 (Ont.).

[41] (1981), 4 L.A.C. (3d) 60 (Can.).

[42] *Supra*, note 5. See Feldstein, *supra*, note 5, at 165.

[43] *Supra*, note 39, at 13.

the few decisions that have been rendered, an attempt has been made by labour boards to carefully balance public safety issues with the privacy rights of employees.

In *Re Canadian Pacific Ltd. and United Transportation Union*,[54] the first award in Canada to address the issue of workplace testing, arbitrator Picher set forth the following principles:[55]

> Where, as in the instant case, the employer is a *public carrier*, and the employee's duties are *inherently safety sensitive*, *any reasonable grounds* to believe that an employee may be impaired by drugs *while on duty or subject to duty* must be seen as justifying a requirement that the employee undergo a drug test. Given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, absent any provision to the contrary.

In this particular case, an employee who refused to submit to a drug test could be subjected to disciplinary measures which included discharge.

The Board held that it was incompatible with the obligations of a public carrier to members of the public, to its workers and to its customers, to place responsibility for the movement of trains on employees who the company has reasonable grounds to believe are impaired by drugs.[56] *Re Monarch Fine Foods Co. Ltd.*[57] was cited for the proposition that an employer has the right to require an employee to submit to a medical examination when the purpose of the examination is to determine whether the employee is physically fit to perform the work assigned in a safe manner. Arbitrator Picher maintained that in limited circumstances, the employer's right to require an employee to undergo a fitness examination extends to drug tests.[58]

It is clear that the *Re Canadian Pacific Ltd.*[59] award limits drug testing to employees who hold safety sensitive positions and only on condition that reasonable grounds exist to believe that the employee is impaired while on duty or subject to duty. The arbitration board states in unequivocal terms

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[54] (1987), 31 L.A.C. (3d) 179 (Can.) (hereinafter referred to as "*Re Canadian Pacific Ltd.*").

[55] *Ibid.*, at 185-86 (emphasis added).

[56] *Ibid.*, at 187.

[57] *Supra*, note 6.

[58] *Re Canadian Pacific Ltd.*, *supra*, note 54, at 185.

[59] *Ibid.*, at 186-87.

that random testing of employees constitutes an unacceptable invasion of an employee's privacy and will not be permitted:[40]

> [I]t is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing.

The Board noted that important differences exist between drug and alcohol substance abuse.[41] First, drug use, in contrast to alcohol consumption, carries the taint of illegality. Second, it is often difficult to discern whether an employee has a drug abuse problem – "[w]hile inebriation through alcohol may be relatively obvious,... the same is not true for the presence of some drugs in an employee".[42] Finally, the Board observed that employers are unaccustomed to dealing with the problems, symptoms and treatment of chronic drug abuse by contrast to alcoholism.[43]

Re Canadian Pacific Ltd. is also important for enunciating the view that drug abuse, like alcoholism, should be regarded as an illness or medical condition.[44] As is stated in *Re Brewers Warehousing Co. Ltd. and United Brewers' Warehousing Workers' Provincial Board, Canadian Brewery Workers Union*,[45] alcoholism does not constitute just cause for discharge as long as there is a reasonable prospect that the employee will be able to respond to treatment so that she can return to work and perform satisfactorily at some time in the future. Similarly, it was stated in *Re Canadian Pacific Ltd.*[46] that an admission by an employee that she is a habitual user of drugs should not necessarily be considered just cause for automatic termination of employment. Arbitrator Picher stated that non-disciplinary measures such as an offer of rehabilitation through a company-sponsored employee assistance program (EAP) may be a more appropriate response.[47] In commenting on the high success rates of EAPs, the Board stressed that EAPs are dependent

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[40] *Ibid.*, at 107.

[41] *Ibid.*, at 102.

[42] *Ibid.*, at 103.

[43] *Ibid.*, at 102.

[44] *Ibid.*, at 109. See, also, R. Solomon, *Employment Drug Testing and Employment Assistance Programs: Legal Rights, Obligations and Liabilities* (London, Ont.: 1988) (unpublished manuscript), at 21.

[45] (1984), 16 L.A.C. (3d) 86 (Ont.), at 94. See, also, *Re Shell Canada Products Co. and Energy & Chemical Workers Union, Local 648* (1986), 26 L.A.C. (3d) 371 (Ont.); *Re MacMillan Bathurst Inc. and I.W.A., Local 242* (1990), 12 L.A.C. (4th) 109 (Ont.), at 116; and *Re B.C. Plumbing Supplies Ltd. and Teamsters Union, Local 213* (1984), 14 L.A.C. (3d) 121, at 130-31, [1984] 1 W.L.A.C. 436 (B.C.).

[46] *Supra*, note 36, at 109.

[47] *Ibid.*, at 109.

upon the voluntary participation of employees and should be perceived as non-threatening.[40] The Board did state, however, that in circumstances where an employee was uncooperative and refused to participate in a rehabilitation program, the company would probably have just cause to terminate employment.[41]

Re Canadian Pacific Ltd.[42] is also significant for underlining the importance of ensuring that the particular drug testing techniques used by management are accurate and reliable. The arbitration board stressed that drug tests must meet rigorous standards with respect to the equipment used, testing procedures, and the qualifications and care exercised by the technicians who administer the tests.[43] The board stated that any employer who seeks to rely on the results of a drug test has the burden of establishing on the balance of probabilities that the particular test is reliable and that the results are accurate.[44]

In *Re Canadian National Railway Co. and U.T.U.*,[45] the Board upheld the grievance of an employee who had been discharged for refusing to submit to a urine test. Endorsing the principles set forth in *Re Canadian Pacific Ltd.*,[46] the Board stated that Canadian National Railway did not demonstrate that it had reasonable and probable grounds to require the employee to submit to a drug test. Although a train accident had occurred, the accident was not attributable to an act or omission on the part of the grievor.[47] It is noteworthy that the Board did not attach any weight to the fact that the grievor had admitted occasional use, on a social basis, of marijuana and hashish.[48] The Board emphasized that only in strictly limited circumstances would a company rule requiring mandatory drug testing be upheld by a labour arbitration board:[49]

> [T]he right that an employer may have to demand that its employees be subjected to a drug test is a singular and limited exception to the right of

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[40] *Ibid.*, at 182.

[41] *Ibid.*, at 189.

[42] *Ibid.*

[43] *Ibid.*, at 186.

[44] *Ibid.*

[45] (1989), 6 L.A.C. (4th) 301 (Can.) (hereinafter referred to as "*Re Canadian National Railway Co. (No. 1)*").

[46] *Supra*, note 36.

[47] *Re Canadian National Railway Co. (No. 1)*, *supra*, note 53, at 303.

[48] *Ibid.*, at 307.

[49] *Ibid.*

> freedom from physical intrusion to which employees are generally entitled by law. As such, it must be used judiciously, and only with demonstrable justification, based on reasonable and probable grounds.

One year later, it was held in *Re Canadian National Railway Co. and U.T.U.*,[58] that the condition in *KVP Co. Ltd.*[59] requiring management to publish and clearly communicate unilateral rules to its employees, was not satisfied. In the particular facts of this case, it was not clearly communicated to the grievor that a breach of the United States Federal Railroad Administration Regulations on alcohol and drug testing (applicable to Canadian National Railway Co. as it operated in the United States) could result in discharge from employment.[60] It is important to note that the arbitration award was highly critical of the significance attributed to urine drug testing. In unequivocal language, the Board stated that urine tests are not capable of indicating whether an employee is impaired or under the influence of drugs at the time the sample is collected.[61]

> The presumption of impairment, invoked in the American regulation by a positive urine test, has no basis in logic or in science. It is admitted that this test demonstrates only the use of a drug during the 60 days prior to the taking of the sample. It provides no precise information concerning when, where or in what quantity the drug was taken. Therefore, the presumption of impairment is a legal construction decreed for the particular purposes of the American regulation.

In the recent award *Re Provincial-American Truck Transporters*,[62] the Ontario arbitration board concluded that the company policy of universal drug testing was unenforceable. The company is in the business of transporting trucks within Canada. Although the drivers spend most of their working hours on the road unsupervised, a company spotter would randomly stop the truckers in order to assess whether they were impaired.

Citing *Re Canadian Pacific Ltd.*,[63] the Board stated that the company did not demonstrate that it had reasonable grounds to believe its drivers were impaired while on duty.[64] According to the Board, a policy of

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[58] (1990), 11 L.A.C. (4th) 364 (Can.), at 367 (hereinafter referred to as "*Re Canadian National Railway Co. (No. 2)*").

[59] *Supra*, note 3.

[60] *Re Canadian National Railway Co. (No. 2)*, *supra*, note 58, at 367.

[61] *Ibid.*, at 368.

[62] *Supra*, note 16.

[63] *Supra*, note 34.

[64] *Re Provincial-American Truck Transporters*, *supra*, note 16, at 423, 425.

mandatory universal testing will not be upheld unless an employer can establish that:[45]

1. a substance abuse problem exists in the workplace; and

2. that alternate, less invasive means do not adequately address the problem.

Applying the above principles to the particular facts, the Board concluded that: (1) there was no evidence that any possible substance abuse problems of individuals in its workplace were having an adverse impact on the company's operations; and, (2) there was no evidence that the existing company rules and required physical examinations did not satisfactorily deal with employees who had substance abuse problems.[46] The Board also noted that the practice of submitting employees to urine drug tests had never been accepted by the union.[47]

In the Board's view, privacy rights are infringed when employees are compelled to submit to urine testing. According to the Board, "the public good does not necessarily require a wholesale disregard for personal liberty".[48] Citing the principles articulated in *Re Lumber Mining Corporation Ltd.*,[49] the Board stated that testing urine for alcohol and drugs compromises the privacy of an individual in a manner similar to a personal search.[50] However, it was observed that testing urine specimens is more invasive than a personal search as urinalysis has the effect of regulating the off-duty behaviour of employees:[51]

> There is a further aspect to the privacy argument in that, even assuming that the urine specimen is not used to determine anything other than whether there has been any past ingestion of alcohol and/or drugs, such testing necessarily involves the employer into an inquiry into what an employee is doing in his/her off-duty hours. Most reasonable people would probably consider that it was none of their employer's business if they happened to drink wine or beer with their meals away from work or enjoy a drink or two in their off-duty hours. Therefore, what one would expect, absent some term in the collective agreement, is an arbitral response to drug testing which is similar to that taken to employee searches and to employer interests in off-duty conduct.

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[45] *Ibid.*, at 425.

[46] *Ibid.*

[47] *Ibid.*

[48] *Ibid.*, at 426.

[49] *Supra*, note 16.

[50] *Re Provincial-American Truck Transporters*, *supra*, note 16, at 432-33.

[51] *Ibid.*, at 433.

The Board suggested that the following concerns ought to be addressed by employers who wish to introduce into evidence the results of a bodily fluid test:[70] (1) management must demonstrate that the particular testing technique is reliable; (2) a proper chain of custody must exist; and (3) procedures must be in place to ensure that the confidential information of employees is being safeguarded.

It is interesting to observe that arbitration awards such as *Re Provincial-American Truck Transport*[71] use an analytical approach similar to judgments rendered pursuant to challenges under the *Canadian Charter of Rights and Freedoms*.[72] In fact, it was stated in *Re Domtar Forest Products Ltd. and I.W.A., Local 1-357*[73] that while the *Charter* does not regulate private party disputes, arbitrators must interpret collective agreements and employment relationships in accordance with the value system imposed by the *Charter*. The issue in *Re Domtar Forest Products Ltd.* was the admissibility of videotaped and visual observations of an employee by a private investigator who had been hired by the employer. The arbitration board cited the standard in *Hunter, Director of Investigation and Research of the Combines Investigation Branch v. Southam Inc.*[74] with respect to the search and seizure provision in section 8 of the *Charter* and stated that the company must demonstrate that it had reasonable grounds to violate the privacy of the worker.[75] Moreover, as in an analysis under section 1 of the *Charter*, the arbitration board held that management must establish that less invasive methods were not available to the company to obtain the particular evidence.[76]

It is important to note that arbitrators in Ontario have imposed drug and alcohol testing on employees as a condition of reinstatement.[77] For

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[70] *Ibid.*, at 42a.

[71] *Ibid.*

[72] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, c. 11 (U.K.) [hereinafter referred to as "*Charter*"]. For general comments, see Finkelstein, *supra*, note 5, at 165.

[73] (1988), 13 L.A.C. (4th) 273 (B.C.), at 279, 281 [hereinafter referred to as "*Re Domtar Forest Products Ltd.*"].

[74] [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

[75] *Re Domtar Forest Products Ltd.*, *supra*, note 73, at 279, 281.

[76] *Ibid.*, at 281.

[77] *Re Fibreglas Canada Inc. and A.C.T.W.U., Local 1305* (1989), 5 L.A.C. (4th) 302 (Ont.); *Re Shell Canada Products Co. and Energy & Chemical Workers Union, Local 648*, *supra*, note 45; *Re Steinberg Inc., Miracle Food Mart Division and Teamsters Union, Local 979* (1988), 33 L.A.C. (3d) 193 (Ont.); and *Re McMillan Bathurst Inc. and I.W.A., Local 242*, *supra*, note 45.

example, in *Re Fiberglas Canada Inc. and A.C.T.W.U., Local 1305*,[60] an employee who had been found smoking marijuana on company property during working hours, was required to submit to random urine and blood testing as a term of reinstatement. Arbitrator O'Shea stated that although there is "no merit for random testing of all employees as a fishing expedition, where an employee is proved to be dependent upon drugs, it may be a very important tool to control the use of drugs".[61] The Board directed the parties, prior to testing, to come to an agreement on the particular testing technique and the testing protocol.[62] The importance of establishing acceptable drug thresholds was stressed in the award:[63]

> Since it would appear that persons who are in a room where others are smoking marijuana and who passively inhale this second-hand smoke may acquire trace elements of marijuana in their bodies, the issue of acceptable levels must be of prime concern.

5. CONCLUSION

The discussion in this chapter demonstrates that the privacy rights of unionized employees are highly valued by arbitrators in Ontario. An examination of the awards rendered in the area of searches of the personal effects of workers, medical examinations and drug and alcohol testing, reveals that management will not be permitted to encroach on the privacy rights of employees except in strictly delineated circumstances.

The following principles can be extracted from the decisions on drug and alcohol testing. First, drug abuse, like alcoholism, is regarded as a medical condition or illness. Consequently, rehabilitation (particularly in employee assistance programs), rather than discharge, is considered to be the appropriate response by management with respect to employees who have a drug or alcohol addiction or dependency. Second, random testing is strictly prohibited. Arbitrators have stated that reasonable and probable grounds must exist in order for management to require an employee to submit to testing and that random searches clearly do not meet the test of reasonableness. Third, the sole justification for testing appears to be limited to positions in which the physical safety of the public or of co-workers is at risk, as for example, railway employees and truck drivers. Moreover, arbitrators have stated that a substantial abuse problem must be

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[60] Supra, note 59.

[61] *Ibid.*, at 5488.

[62] *Ibid.*, at 5488-489.

[63] *Ibid.*, at 5488.

demonstrated in the particular workforce in order for universal drug and alcohol testing to be justified. Finally, in order to justify the chemical testing of its employees, management must establish that alternate, less invasive means do not adequately address the substance abuse problems pervading their workforce.

One can discern from the emerging jurisprudence on drug and alcohol testing an uneasiness amongst Ontario arbitrators with respect to urinalysis. Some arbitrators are highly critical of urine drug testing as it is incapable of indicating impairment. Others have stated in unequivocal terms that management has no right to regulate the off-duty conduct of members of its workforce. Finally, the awards demonstrate serious concern respecting the reliability of the testing techniques currently used, as well as apprehension that the confidential information of employees is not being adequately safeguarded.

CHAPTER 5

THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

1. INTRODUCTION

The Commission will now examine whether drug and alcohol testing programs are likely to survive a constitutional challenge. Our discussion begins with an analysis of section 32 of the *Canadian Charter of Rights and Freedoms*[1] which determines the circumstances in which *Charter* principles are applicable to testing programs. The Commission will then address the issue of whether drug and alcohol workplace testing infringes section 7 and section 8 of the *Charter* and if so, whether such programs are likely to be justified under section 1.

2. THE SCOPE OF *CHARTER* APPLICATION

In this section, the Commission considers the extent to which drug and alcohol testing programs are subject to *Charter* scrutiny. As background to the discussion that follows, it is important to understand that testing programs which do not fall within the reach of *Charter* application may be subject to the provisions of applicable human rights legislation, whether provincial or federal. The application of human rights legislation is considered in chapter 6 of this Report.

The constitutional provision which governs the scope of the application of the *Charter* is section 32:

> 32.-(1) This Charter applies
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> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

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[1] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the "*Charter*").

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Section 32 has been interpreted to apply only to government or governmental action and not to private actors engaged in private activities.[1] However, the elaboration of this interpretation by the courts has proved difficult; the emerging section 32 jurisprudence demonstrates the complexities involved in determinations of what constitutes "government" for *Charter* purposes. Such determinations are, of course, central, as they will resolve the issue of whether the testing programs instituted by the bodies in issue must comply with the standards mandated by the relevant substantive *Charter* provisions.

The Supreme Court of Canada has provided some direction with respect to the interpretation of section 32 of the *Charter*. *Dolphin Delivery Ltd.*,[2] the first Supreme Court case to consider this issue at length, stated in unequivocal terms that the *Charter* applies only to government and governmental action and not to private actors engaged in private actions. However, the Court failed to specify what constitutes governmental action and how that determination ought to take place.

The case that is easiest to resolve in terms of *Charter* application is one in which government enacts legislation to govern testing programs in the workplace. Such legislation could take the form of explicitly providing for mandatory testing or of simply providing a framework within which testing would be permitted under certain circumstances. The legislation, whether it governed private or public testing or both, would constitute government action and would clearly fall within the ambit of section 32. It would thus be required to conform with *Charter* provisions.[4]

At the other extreme are testing programs instituted by purely private employers. In the absence of any legislation governing the institution or boundaries of the programs, the purely private action of establishing a testing regime would fall beyond the reach of the *Charter*. As stated in *Dolphin*

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[1] *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at 597, 33 D.L.R. (4th) 174, at 193-94 (subsequent references are to [1986] 2 S.C.R.) (hereinafter referred to as "*Dolphin Delivery Ltd.*").

[2] *Ibid.*

[4] See, for example, the reasons of the majority in *Dolphin Delivery Ltd.*, *ibid.*; and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700 (subsequent references are to [1990] 3 S.C.R.) (hereinafter referred to as "*Stoffman*").

Delivery Ltd., the *Charter* does not apply to actions between private parties that are "divorced completely from any connection with Government".[3]

Drawing the line in between those two outermost examples is more difficult. This is evident from an examination of the Supreme Court's elaboration of section 32 in *McKinney v. University of Guelph*,[4] *Stoffman v. Vancouver General Hospital*,[5] *Harrison v. University of British Columbia*[6], and *Douglas/Kwantlen Faculty Association v. Douglas College*,[7] four cases in which the mandatory retirement policies of various institutions were challenged.

In these cases, the Supreme Court divided on the issue of the appropriate test to be applied to section 32 of the *Charter*. The majority decision in the four cases on this issue was written by Mr. Justice La Forest. Rather than articulate a broad test to be applied in each particular case, La Forest J.'s approach was to focus on the relationship of each institution to the government, critically described by Wilson J. as "an *ad hoc* approach to the status of each entity brought before the Court".[8]

McKinney[9] involved the mandatory retirement policies of four Ontario universities. The Court held that the mere fact that an institution has been created by statute does not necessarily imply that it is governed by the *Charter*.[10] Private corporations, for example, are not subject to the *Charter*.[11] Although the majority acknowledged that a distinction may be made between a private corporation and a corporation serving the public interest, it stated that a public purpose test should not be relied upon with respect to the application of the *Charter*.[12] Entities such as railroads, airlines and symphonies all perform public services, yet they do not form part of the government for the purposes of the application of the *Charter*.[13] In the Court's opinion, it is not sufficient for the purposes of section 32 for a party

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[3] *Supra*, note 2, at 593.

[4] [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 (subsequent references are to [1990] 3 S.C.R.) (hereinafter referred to as "*McKinney*").

[5] *Supra*, note 4.

[6] [1990] 3 S.C.R. 451, 77 D.L.R. (4th) 55 (subsequent references are to [1990] 3 S.C.R.).

[7] [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94 (subsequent references are to [1990] 3 S.C.R.) (hereinafter referred to as "*Douglas College*").

[8] *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at 239, 81 D.L.R. (4th) 545, at 564 (subsequent references are to [1991] 2 S.C.R.).

[9] *Supra*, note 6.

[10] *Ibid.*, at 263-66.

[11] *Ibid.*, at 266.

[12] *Ibid.*, at 269.

[13] *Ibid.*

to prove that an entity engages in activities that are subject to the legislative jurisdiction of the federal or provincial governments.[16]

In *McKinney*, the Court examined the relationship of the university to the government. La Forest J. stressed that although universities are highly dependent on the government, they do not in fact constitute organs of the government.[17] As the Court stated, universities are independent in the management of their affairs and this is certainly the case with regard to the universities' mandatory retirement policies.[18] Thus, the Supreme Court held that universities do not form part of the government within the meaning of section 32 and therefore, the *Charter* provisions have no application to the mandatory retirement policies of the university.[19]

La Forest J. adopted a similar approach in *Stoffman*.[20] The Court came to the conclusion that *Charter* principles had no application to the hospital's mandatory retirement policy. The Court stressed that the hospital by-laws are the internal management of the hospital; the by-laws in issue had not been imposed on the hospital by the Ministry of Health.[21] La Forest J. stated that a distinction must be made between ultimate control and routine control and, that in *Stoffman*, the hospital had routine control of its affairs.[22] The Court reiterated the principle that it is not determinative for the purposes of section 32 of the *Charter* that the institution perform an important public service.[23] For the above reasons, the Court held that hospitals are not part of the "government" and thus the *Charter* provisions have no application to the mandatory retirement policy of the Vancouver General Hospital.[24]

In *Douglas College*,[25] the Court held that the *Charter* does apply to community colleges. The Court reasoned that colleges are agents of the Crown pursuant to a statute and can only exercise powers as defined in the

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[16] *Ibid.*, at 270-71.

[17] *Ibid.*, at 272.

[18] *Ibid.*, at 273-74.

[19] *Ibid.*, at 275. The court in *Harrison v. University of British Columbia*, *supra*, note 6, adopted the reasoning in *McKinney*, and came to the conclusion that universities are not subject to the provisions in the *Charter*.

[20] *Supra*, note 4.

[21] *Ibid.*, at 506.

[22] *Ibid.*, at 512-13.

[23] *Ibid.*, at 511.

[24] *Ibid.*, at 516.

[25] *Supra*, note 9.

legislation.[39] The Minister retains direct and substantial control over the college. The college is a delegate of the government and performs acts of the government.[37] Consequently, any dealings which the college has with its employees constitute government action within the meaning of section 32 of the *Charter*.[38]

Similarly, the Court held in *Lavigne v. Ontario Public Service Employees Union*[39] that the *Charter* applied to the collective agreement entered into by the community college. It was stated that the Council of Regents, who on behalf of the board of governors had entered into a collective agreement with the union, constituted "government" for the purposes of section 32. The college is a Crown agent whose activities are controlled by the Ministry of Colleges and Universities.[40] The Minister is responsible for the collective bargaining of the college with its employees who are Crown employees.

The above Supreme Court decisions demonstrate that the majority's approach to the *Charter* application issue is *ad hoc*. This is in contrast to the principled approach of Wilson J., set out at length in her dissent in *McKinney*.[41] Wilson J. delineated a three-part test to be used to determine whether a body constitutes "government" for the purposes of section 32 of the *Charter*:[42]

1. whether the institution performs a function pursuant to statutory authority on behalf of the government in furtherance of a governmental purpose;

2. whether there is government control of the institution as for example, its governing structure, its policies, its funding; and

3. whether the institution performs a government function.

Wilson J. emphasized that each of the above factors is to be analyzed in relation to the others; fulfilment of a single factor does not necessarily imply that the institution is "governmental" for the purposes of section 32.[43] After examining these factors in *McKinney*,[44] *Stoffman*,[45] *Harrison v. University*

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[36] *Ibid.*, at 506.

[37] *Ibid.*

[38] *Ibid.*, at 566-67.

[39] *Supra*, note 16.

[40] *Ibid.*, at 261-62.

[41] *Supra*, note 6, at 328 *et seq.*

[42] *Ibid.*, at 358-71.

[43] *Ibid.*, at 358-59.

[44] *Supra*, note 6.

of British Columbia[16] and *Douglas College*,[17] Wilson J. concluded that the *Charter* applies to universities, hospitals and community colleges.

Wilson J.'s disapproval of the majority's lack of a principled approach to section 32 is evident in her judgments. As she states in *Lavigne v. Ontario Public Service Employees Union*:[18]

> I fully appreciate that in *McKinney* and the appeals which were heard along with it only two of my colleagues endorsed my test for determining whether or not a body is a government actor for purposes of s. 32(1) of the *Charter*. On the other hand, I am unable to find a different test of *general* application enunciated in the reasons of the majority. Those reasons appear to me to reflect an *ad hoc* approach to the status of each entity brought before the Court in order to determine whether or not it forms 'part of the apparatus of government' so as to be subject to *Charter* review. This being so, I do not feel as constrained by precedent as I otherwise might. Indeed, I am unchastened in the view that this Court has a duty to take a structured approach to this issue and establish appropriate criteria if at all possible for distinguishing those bodies which are subject to *Charter* constraint from those which are not. In any event, whether I am right or wrong on this, I believe that the *ad hoc* approach would yield the same result in this particular case.

The above discussion demonstrates that it is difficult to predict with any certainty whether or not *Charter* principles will apply to particular bodies or institutions. The Supreme Court has held that the *Charter* applies to community colleges but not to universities or hospitals. It is uncertain whether other entities such as many Crown corporations or municipalities will fall within the ambit of section 32 of the *Charter*.

3. UNREASONABLE SEARCH AND SEIZURE: SECTION 8 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

In this section, the Commission addresses the issue of whether workplace testing programs contravene the guarantee against unreasonable search and seizure in section 8 of the *Charter*. Section 8 provides:

> 8. Everyone has the right to be secure against unreasonable search or seizure.

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[16] *Supra*, note 4.

[17] *Supra*, note 5.

[18] *Supra*, note 9.

[19] *Supra*, note 10, at 230.

(a) The Reasonable Expectation of Privacy

Hunter, Director of Investigation and Research of the Combines Investigation Branch v. Southam Inc.[38] is the seminal case on the interpretation of section 8 of the *Charter*. The Supreme Court stated in unequivocal language that section 8 "guarantees a broad and general right to be secure from unreasonable search and seizure"[39] and that the purpose of section 8 is to protect individuals from unjustified state intrusions upon their privacy. The Court stated that the *Charter* protection is limited to searches or seizures that intrude upon an individual's reasonable expectation of privacy. As Dickson J. (as he then was) wrote:[40]

> The guarantee of security from *unreasonable* search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from 'unreasonable' search and seizure, or positively as an entitlement to a 'reasonable' expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

Further, Dickson J. states:[41]

> [A]n assessment of the constitutionality of a search and seizure, or of a statute authorizing a search or seizure, must focus on its 'reasonable' or 'unreasonable' impact on the *subject* of the search and the seizure, and not simply on its rationality in furthering some valid governmental objective.

In *R. v. Dymont*,[42] the Supreme Court affirmed the proposition in *Hunter v. Southam*[43] that a major purpose of section 8 is the protection of the privacy of an individual and that this *Charter* guarantee is not restricted to the protection of property. As La Forest J. states:[44]

> From the earliest stage of *Charter* interpretation, this Court has made it clear that the rights it guarantees must be interpreted generously, and not in a narrow or legalistic fashion; see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at

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[38] [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 (subsequent references are to [1984] 2 S.C.R.) (hereinafter referred to as "*Hunter v. Southam*").

[39] *Ibid.*, at 158.

[40] *Ibid.*, at 159-60.

[41] *Ibid.*, at 157.

[42] [1988] 2 S.C.R. 417, 55 D.L.R. (4th) 503 (subsequent references are to [1988] 2 S.C.R.).

[43] *Supra*, note 38, at 159-60.

[44] *R. v. Dymont*, *supra*, note 42, at 426.

> p. 344. The function of the *Charter*, in the words of the present Chief Justice, then Dickson J., in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155, 'is to provide ... for the unremitting protection of individual rights and liberties'. It is a purposive document and must be so construed. That case dealt specifically with s. 8. It underlined that a major, though not necessarily the only, purpose of the constitutional protection against unreasonable search and seizure under s. 8 is the protection of the privacy of the individual: see especially pp. 159-60. And that right, like other *Charter* rights, must be interpreted in a broad and liberal manner so as to secure the citizen's right to a reasonable expectation of privacy against governmental encroachments. Its spirit must not be constrained by narrow legalistic classifications based on notions of property and the like which served to protect this fundamental human value in earlier times.

La Forest J. also emphasizes that individual privacy "is at the heart of liberty in a modern state".[46] He writes the following:[47]

> Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restrictions imposed on government to pry into the lives of the citizen go to the essence of a democratic state.

It was stated in *R. v. Dymont* that section 8 of the *Charter* is intended to protect three zones of privacy: (1) territorial or spatial privacy; (2) privacy of the person; and (3) informational privacy.[48] Territorial privacy is essentially the protection of an individual's property.[49] Privacy of the person, according to the Supreme Court, offers protection not only against the physical search of the person but also as against the indignity of the search, its invasion of the person in a moral sense.[50] The Court cited *R. v. Pohoretsky*[51] for the proposition that "a violation of the sanctity of a person's body is much more serious than that of his office or even of his home".[52] As La Forest J. states:[53]

> [t]he constitution does not tolerate a 'low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of

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[46] *Ibid.*, at 427.

[47] *Ibid.*, at 427-28.

[48] *Ibid.*, at 428-30.

[49] *Ibid.*, at 428.

[50] *Ibid.*, at 428, quoting *Privacy and Computers* (report of the Task Force established by the Department of Communications and the Department of Justice) (1972), at 13.

[51] [1987] 1 S.C.R. 945, at 949, 39 D.L.R. (4th) 699, at 702.

[52] *R. v. Dymont*, *supra*, note 43, at 430.

[53] *Ibid.*, at 430.

considerable latitude" (*Hunter v. Southam Inc.*, *supra*, at p. 167); if anything, where the search and seizure relates to the integrity of the body rather than the home, for example, the standard is even higher than usual.

The third zone of privacy, as described in *R. v. Dymont*,[14] is privacy in relation to information. As the Court states, "this notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit".[15] In other words, this zone of privacy protects an individual from being compelled to disclose sensitive information about himself. The Court observed that particularly in modern society, retention of information about oneself is extremely important and must be zealously safeguarded.[16] It noted that governments at both the federal and provincial levels have promulgated privacy legislation to protect these interests.[17]

Applying these principles to drug and alcohol testing, a convincing argument could be made that workplace testing intrudes upon an individual's reasonable expectation of privacy contrary to section 8 of the *Charter*. In particular, testing may be held by the courts to violate privacy of the person as well as informational privacy. In other words, it could be argued that testing constitutes a serious affront to human dignity as described in *R. v. Dymont* and *R. v. Pohoretsky* and, as well, obliges an individual to disclose personal information to his employer concerning his lifestyle and medical status. As the Court states in *R. v. Duarte*,[18] privacy may be defined as "the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself".

(b) The Minimum Content of the Constitutional Guarantee in Section 8

It was stated in *Hunter v. Southam*[19] that once section 8 of the *Charter* is implicated by a reasonable expectation of privacy, it must be established that the state obtained prior authorization, such as a warrant, before it conducted a search. As Dickson J. explains:[20]

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[14] *Ibid.*, at 428-30.

[15] *Ibid.*, at 428, quoting *Privacy and Computers*, *supra*, note 50, at 13.

[16] *R. v. Dymont*, *supra*, note 43, at 430.

[17] *Ibid.*

[18] [1990] 1 S.C.R. 30, at 46, 65 D.L.R. (4th) 240, at 252.

[19] *Supra*, note 39.

[20] *Ibid.*, at 160-61.

> The purpose of a requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior.

The Court stated that the individual who authorizes the search need not be a judge but "must at a minimum be capable of acting judicially".[41] In order for the state to obtain the necessary authorization to conduct a search, it must demonstrate under oath that there are reasonable and probable grounds to believe that an offence has been committed and that a search will reveal evidence of the crime.[42] However, the Supreme Court stated that in situations in which the state objective is not law enforcement, the standard may be different":[43]

> Where the State's interest is not simply law enforcement as, for instance, where State security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one.

The Court in *Hunter v. Southam* recognizes "that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectations of privacy".[44] It stated that it is permissible to dispense with a warrant in circumstances in which it is not feasible to obtain prior authorization. However, the Court held that a warrantless search is *prima facie* unreasonable under section 8 and that it is incumbent on the "party seeking to justify a warrantless search to rebut this presumption of unreasonableness".[45] As Lamer J. states in *R. v. Collins*,[46] once the appellant demonstrates that the search was warrantless, the onus is on the Crown to prove on a balance of probabilities that the search was reasonable.

Despite the feasibility limitation on the warrant requirement, the Supreme Court has not carved out specific exemptions for designated situations in which it is difficult to secure a warrant prior to a search. This

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[41] *Ibid.*

[42] *Ibid.*, at 167. The Court stated that reasonable and probable grounds means "strong reasons to believe" because "[t]he state's interest in detecting or preventing crime begins to prevail over the individual's interest in being left alone at the point where credibly-based probability replaces suspicion".

[43] *Ibid.*, at 168.

[44] *Ibid.*, at 161.

[45] *Ibid.*

[46] [1987] 1 S.C.R. 265, 30 D.L.R. (4th) 606.

is in contrast to the approach of courts in the United States which have created several "blanket" exceptions to the warrant requirement in the Fourth Amendment to the United States Constitution.[47] The Amendment reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In the past two decades, the list of recognized exceptions has significantly increased, and as an American observer[48] contends, the rule has become submerged into the exceptions. Currently, there are over twenty exceptions to the warrant model which include: automobile searches, border searches, administrative searches, fire investigations, boat boarding for documents checks, airport searches, school searches and workplace searches.[49] In such cases, the United States courts have basically substituted a general balancing of reasonableness for the warrant and probable cause model – the threshold has been lowered in order to allow for searches based upon reasonable suspicion rather than the higher standard of reasonable and probable cause. However, the drug testing cases recently rendered by the United States Supreme Court represent a dramatic departure from previous decisions as the Court abandoned the requirement of individualized suspicion as a precondition to searches conducted in the workplace.[50]

It is clear in such decisions as *R. v. Simmons*[51] that the *Hunter v. Southam* safeguards are not immutable and that a "determination of

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[47] See *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989), and *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989).

[48] A. Lewis, "Drug Testing: Can Privacy Interests Be Protected Under the 'Special Needs' Doctrine?" (1990), 56 Brooklyn L. Rev. 103 S. at 1036.

[49] See *O'Connor v. Ortega*, 107 S. Ct. 1492, 480 U.S. 709 (1987); *New Jersey v. T.L.O.*, 105 S. Ct. 733, 469 U.S. 325 (1985); and *New York v. Burger*, 107 S. Ct. 2636, 482 U.S. 691 (1987).

[50] *Skinner v. Railway Labor Executives' Association*, supra, note 47; and *National Treasury Employees Union v. Von Raab*, supra, note 47. See J.S. Abrams, "Constitutional Law – Search and Seizure" (1990), 14 Suffolk Transnational L.J. 260; M.A. Kelly and R.M. Kelly, "Drug and Alcohol Testing in the Workplace: A Public Sector Overview Since *Skinner* and *Von Raab*" (1989), 16 Gov't. Union Rev. 36; E. Oberlander, "When Workers Say 'No' to Drug Testing: Issues in the Public and Private Sectors" (1990), 30 J. Urban & Contemp. L. 107, at 160; R.A. Petersen, "Balancing Public Interests v. Individual Rights: Is Drug Testing of Federal Employees Here to Stay?: *National Treasury Employees Union v. Von Raab*" (1990), 11 Hamline J. Pub. L. & Pol'y 195; and P.M. Giuliotti, "Drug Testing and Workers' Taking the Drug War to Unconstitutional Limits?" (1991), 66 Ind. L.J. 779.

[51] [1988] 2 S.C.R. 495, at 527, 55 D.L.R. (4th) 673, at 678 (subsequent references are to [1988] 2 S.C.R.).

reasonableness" in section 8 of the Charter "must depend to some degree on the circumstances in which a search is performed". The provisions under the *Customs Act*[70] whose constitutionality was being impugned in *R. v. Simmons* did not meet the *Hunter v. Southam* safeguards.[71] (1) there was no warrant or prior authorization required as a precondition to conducting a border search; and (2) the standard of "reasonable cause to suppose" as prescribed in the *Customs Act*, constituted a lower standard than the "reasonable and probable grounds" prescribed in *Hunter v. Southam*. The Court in *R. v. Simmons* adopted a contextual approach to the *Hunter v. Southam* model and allowed for lower standards for searches at border crossings. Dickson C.J.C. reasoned:[72]

> [T]he degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international boarders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to ascertain that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function. Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process. This process will typically require the production of proper identification and travel documentation and involve a search process beginning with completion of a declaration of all goods being brought into the country. Physical searches of luggage and of the person are accepted aspects of the search process where there are grounds for suspecting that a person has made a false declaration and is transporting prohibited goods.

Despite the statements that departures from the *Hunter v. Southam* safeguards would be permitted in certain contexts, the Court in *R. v. Simmons* cautioned that it would be "exceedingly rare":[73]

> In my view, however, it would be incorrect to place overwhelming emphasis on the surrounding circumstances when assessing reasonableness under s. 8. Regardless of the commission criteria in the circumstances, the safeguards articulated in *Hunter v. Southam Inc.* should not be lightly rejected. Although *Hunter* did not purport to set down immutable preconditions for validity applicable to all searches, the Court arrived at the three minimum prior authorization requirements only after examining the values s. 8 is meant to protect. Foremost among these values is the interest in preventing unjustified searches before they occur. This is a basic value regardless of situational

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[70] R.S.C. 1970, c. C-40.

[71] *R. v. Simmons*, supra, note 71, at 524.

[72] *Ibid.*, at 526.

[73] *Ibid.*, at 527.

> constraints. In light of the importance of preventing unjustified searches, departures from the *Hunter v. Southam Inc.* standards that will be considered reasonable will be exceedingly rare.

A review of the case law reveals that the *Hunter v. Southam* safeguards may be departed from in the context of administrative inspections. There appear to be two rationales that explain why courts have held that a less strenuous standard will be applied to cases in which the search is administrative or regulatory in nature. First, it is maintained that only a limited privacy interest exists in an environment already subject to state regulation. Second, the courts have stressed that the regulatory objective is one of compliance and not prosecution; consequently, an individual will not be subjected to a highly stigmatizing prosecution as a result of the search.

For example, in *Re Belgoma Transportation Ltd. and Director of Employment Standards*,[76] the issue before the Ontario Court of Appeal was whether a provision in the *Employment Standards Act*,[77] which authorizes an employment standards officer to enter business premises and to require the production of documents without a warrant, violated section 8 of the *Charter*. In upholding the provision, the Court stated that it is essential, for the purposes of assessing the constitutionality of a statutory provision under section 8, to make a distinction between criminal and regulatory searches. As MacKinnon A.C.J.O. wrote:[78]

> The standards to be applied to the reasonableness of a search or seizure and the necessity for a warrant with respect to criminal investigations cannot be the same as those to be applied to search or seizure within an administrative and regulatory context. Under the *Employment Standards Act*, there is no necessity that the officer have evidence that the Act has been breached. In the course of carrying out administrative duties under the Act, what is commonly called a 'spot audit' may be carried out, which helps ensure that the provisions of the Act are being complied with. The limited powers given for this purpose as set out in the section are not unreasonable.

The Court stressed that the objective of the "search" was not to detect criminal activity but rather to ensure compliance with the regulatory provisions of the *Employment Standards Act*,[79] provisions enacted for the purpose of the protection of employees. The Court noted that under the Act, the standards were more stringent respecting searches of dwellings; unless an

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[76] (1985), 51 O.R. (2d) 509, 20 D.L.R. (4th) 156 (C.A.) (subsequent references are to 51 O.R. (2d)) (hereinafter referred to as "*Belgoma*").

[77] R.S.O. 1980, c. 137, s. 45.

[78] *Belgoma*, *supra*, note 76, at 512.

[79] *Supra*, note 77.

employment standards officer obtained a search warrant, he was prohibited from entering the dwelling without the consent of the occupier.[80]

Belgoma[81] was cited with approval in *R. v. Quesnel*.[82] In this case, the Ontario Court of Appeal upheld a provision in the *Farm Products Marketing Act*[83] which permitted premises to be inspected without a warrant for the purpose of determining whether individuals engaged in the production of chickens were exceeding the designated quotas. Similarly, the British Columbia Court of Appeal in *R. v. Bichel*,[84] in upholding a zoning by-law, stated that while a warrant is required for searches in the course of a criminal investigation, prior authorization is not necessary to conduct an investigation to ensure compliance with a zoning by-law.

In 1990, the Supreme Court of Canada rendered two decisions, *Thomson Newspapers v. Canada (Director of Investigation and Research – Restrictive Trade Practices Commission)*[85] and *R. v. McKinlay Transport Ltd.*,[86] which endorsed the distinction between criminal and regulatory searches for the purpose of assessing the constitutionality of statutory provisions under section 8 of the *Charter*. In *Thomson Newspapers*,[87] where the Court addressed the issue of whether compelled testimony and the compelled production of documents for an inquiry under the *Combines Investigation Act*[88] violated section 8, La Forest J. made the following statements:[89]

> Since the adoption of the *Charter*, Canadian courts have on numerous occasions taken the view that the standard of reasonableness which prevails in the case of a search or seizure made in the course of enforcement of the criminal law will not usually be appropriate to a determination of reasonableness in the administrative or regulatory context; ...The same approach underlies the decision

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[80] *Belgoma*, *supra*, note 76, at 512. See, also, *R. v. Rao* (1984), 46 O.R. (2d) 80, 9 D.L.R. (4th) 542 (C.A.); leave to appeal to S.C.C. refused (1984), 57 N.R. 238, 10 C.R.R. 275n (S.C.C.).

[81] *Supra*, note 76.

[82] (1985), 53 O.R. (2d) 338, 24 C.C.C. (2d) 78 (C.A.); leave to appeal to S.C.C. refused (1986), 55 O.R. (2d) 543, 68 N.R. 160n (S.C.C.).

[83] R.S.O. 1980, c. 158.

[84] (1986), 4 B.C.L.R. (2d) 132, at 139-40, 33 D.L.R. (4th) 254, at 262 (C.A.).

[85] [1990] 1 S.C.R. 425, 67 D.L.R. (4th) 161 (subsequent references are to [1990] 1 S.C.R.) (hereinafter referred to as "*Thomson Newspapers*").

[86] [1990] 1 S.C.R. 627, 68 D.L.R. (4th) 568 (subsequent references are to [1990] 1 S.C.R.)

[87] *Supra*, note 85.

[88] R.S.C. 1970, c. C-23.

[89] *Supra*, note 85, at 506-08. See, also, *R. v. Grosky*, [1991] 5 W.W.R. 547 (Man. Q.B.).

of this Court in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, released concurrently, in which an order to produce documents issued under s. 231(3) of the *Income Tax Act* is viewed as administrative and held to be not unreasonable under s. 8 of the *Charter*.

The application of a less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the elaboration of s. 8. As Dickson J. made clear in *Hunter Southam Inc.*, [1984] 2 S.C.R. 145, the purpose of s. 8 is the protection of the citizen's reasonable expectation of privacy (p. 159). But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state. The restauranteur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation, and the developer's or homeowner's compliance with building codes or zoning regulations, can only be tested by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often only be assessed by inspection of the employer's files and records.

. . . .

The situation is, of course, quite different when the state seeks information, not in the course of regulating a lawful social or business activity, but in the course of investigating a criminal offence. For reasons that go to the very core of our legal tradition, it is generally accepted that the citizen has a very high expectation of privacy in respect of such investigations. The suspicion cast on persons who are made the subject of a criminal investigation can seriously, and perhaps permanently, lower their standing in the community. This alone would entitle the citizen to expect that his or her privacy would be invaded only when the state has shown that it has serious grounds to suspect guilt. This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law. The requirement of a warrant, based on a showing of reasonable and probable grounds to believe that an offence has been committed and evidence relevant to its investigation will be obtained, is designed to provide this protection.

The *Thomson Newspapers* decision highlights the importance of determining the strength of the privacy interest.[90] Whether the proceedings are regulatory or criminal in nature, whether business records or personal papers are being searched, and whether business premises or a residence is being searched, play a crucial role in assessing the scope of section 8.[91] For instance, where the proceedings are regulatory and where only the production of business documents without entry into premises is required, there is a low expectation of privacy and thus, section 8 affords a lower level of protection. In such a case, it is not necessary to satisfy the strict prerequisites of a valid search as articulated in *Hunter v. Southam*.

Given the principles enunciated in the decisions discussed above, what conclusion will courts arrive at respecting the constitutionality of drug and alcohol testing programs under section 8 of the *Charter*? It could be argued that testing in the workplace is in the nature of a regulatory scheme enacted to further the state's interest in workplace safety and labour productivity. However, if the consequence of a positive test result for an employee is dismissal or serious disciplinary measures, then the argument that regulatory searches do not lead to stigmatization is weakened. Moreover, it is stated in *R. v. McKinlay Transport Ltd.*[92] that the distinctive feature of a regulatory search is not the absence of sanctions tantamount to criminal sanctions, but rather the diminished expectation of privacy for the targets of the search. As Wilson J. states:[93]

> The greater the intrusion into the privacy interests of an individual, the more likely it will be that safeguards akin to those in *Hunter* will be required. Thus, when the tax officials seek entry onto the private property of an individual to conduct a search or seizure, the intrusion is much greater than a mere demand for production of documents. The reason for this is that, while a taxpayer may have little expectation of privacy in relation to his business records relevant to the determination of his tax liability, he has a significant privacy interest in the inviolability of his home.

Thus, if the key to the modification of the *Hunter v. Southam* safeguards is the expectation of privacy, a strong argument could be made that workplace testing programs violate section 8. Although drug and alcohol testing occurs in the context of a regulatory scheme dealing with the workplace, the intrusion occasioned by the testing has far more substantial implications for privacy interests than does an examination of business

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[90] D. Stratas, *The Charter of Rights In Litigation* (Aurora, Ont.: Canada Law Book, 1992, looseleaf), Part I, §18:02, at 18-3.

[91] *Ibid.*, §18:02, at 18-3.

[92] *Supra*, note 86, at 649.

[93] *Ibid.*

documents. Indeed, the movement towards an administrative inspection "exception" is founded upon the premise that the search will be directed toward documents or the physical layout of the workplace. If the inviolability of the home demands a rigorous application of the *Hunter v. Southam* model, the same can be said with respect to the inviolability of the body. The courts have always approached the issue of bodily intrusions as more serious than searches of documents or physical environments.

A review of the case law reveals that the courts have zealously guarded against unnecessary and unjustified intrusions upon the body by means of the extraction of bodily fluids or surgical interventions. As stated in *R. v. Collins*[94] and *R. v. Dyment*,[95] body searches or seizure of intimate samples require a higher standard of reasonableness because of the privacy interests at stake.[96] Similarly, in *R. v. Greffe*,[97] the Supreme Court held that a rectal examination by a doctor using a sigmoidoscope constituted an extremely serious violation of the individual's section 8 rights. Lamer J., speaking for the majority, stated that it is difficult to justify such a search given the physical intrusiveness as well as the issues of human dignity and bodily integrity which emanate from such a search.[98] Applying these principles to workplace testing, the Commission is of the view that since testing has a pronounced impact upon an individual's privacy interests, it will likely be very difficult to justify modification of the *Hunter v. Southam* safeguards on the basis of the regulatory aspects of the practice.[99]

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[94] *Supra*, note 66.

[95] *Supra*, note 43.

[96] See Stratas, *supra*, note 90, §18:07[2](a)[i], at 18-19.

[97] [1990] 1 S.C.R. 755, [1990] 3 W.W.R. 577 (subsequent references are to [1990] 1 S.C.R.).

[98] *Ibid.*, at 795-96. See, also, D. Stuart, *Charter Justice in Canadian Criminal Law* (Scarborough, Ont.: Carswell, 1991), at 165.

[99] With respect to the issue of consent to an unauthorized search under s. 8 of the *Charter*, F. Chevrette states in "Protection Upon Arrest or Detention and Against Retroactive Penal Law" (translation), published in G.-A. Beaudoin and E. Ratushny (eds.), *Canadian Charter of Rights and Freedoms* (2nd ed.) (Toronto: Carswell, 1989) 388, at 408, that "Canadian law ... is in the its first stages of development and requires a considerably greater degree of articulation". However, a review of the case law to date reveals that a strong argument can be made that an employee who submits to a urine, blood, breath or other extraction of a bodily sample is not consenting to what would otherwise be an unauthorized search under the *Charter* and thus is not waiving his s. 8 rights. In *R. v. Wills* (1992), 7 O.R. (3d) 337, at 353, the Ontario Court of Appeal held that in order to establish that an individual "consented" to a s. 8 search, the Crown must prove the following six conditions on a balance of probabilities. They are that:

(i) there was a consent, express or implied;

(ii) the giver of the consent had the authority to give the consent in question;

(iii) the consent was voluntary in the sense that the word is used in *Goldman* [infra],

(c) THE STANDARD FOR TESTING

United States jurisprudence has recognized that the probable cause standard mandated in the Fourth Amendment may be modified to take into account special needs and the reduced expectation of privacy. The drug

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and was not the product of police oppression, coercion or other external conduct which negated the freedom to choose whether or not to allow the police to pursue the course of conduct requested;

(iv) the giver of the consent was aware of the nature of the police conduct to which he or she was being asked to consent;

(v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and

(vi) the giver of the consent was aware of the potential consequences of giving the consent.

Doherty J.A. in *R. v. Wills* stated in unequivocal language that "[a]cquiescence and compliance signal only a failure to object; they do not constitute consent" (at 348).

The Court in *R. v. Wills* applied the principles articulated in the Supreme Court of Canada decision, *Goldman v. R.*, [1980] 1 S.C.R. 976, 108 D.L.R. (3d) 17 (subsequent references are to [1980] 1 S.C.R.). The issue in *Goldman v. R.* was the nature of the consent required to render the interception of communications lawful pursuant to s. 178.11(2)(*a*) of the 1970 *Criminal Code*, *infra*, note 119, as enacted by 1973-74, c. 50, s. 2 (now s. 184(2)(a) of the 1985 *Criminal Code*), *infra*, note 161. In the words of the Supreme Court (at 1005):

> The consent given under s. 178.11(2)(*a*) must be voluntary in the sense that it is free from coercion. It must be made knowingly in that the consenter must be aware of what he is doing and aware of the significance of his act and the use which the police may be able to make of the consent.... A consent under s. 178.11(2)(*a*) is a valid and effective consent *if it is the conscious act of the consenter doing what he intends to do for reasons which he considers sufficient.* If the consent he gives is the one he intended to give and if he gives it as a result of *his own decision and not under external coercion* the fact that his motives for so doing are selfish and even reprehensible by certain standards will not vitiate it. (Emphasis added)

Similarly, the Alberta Queen's Bench in *R. v. Meyers* (1987), 52 Alta. L.R. (2d) 156, at 169, [1987] 4 W.W.R. 624, at 637, stated that: "The consent must have been made consciously, freely and voluntarily given. It may be given by words or by conduct. It must not have been obtained by direct or indirect inducement, threat, intimidation or manipulation". See, also, S.C. Hutchison and J.C. Morton, *Search and Seizure Law in Canada* (Toronto: Carswell, 1991, looseleaf), at 6-7, who state that "where the consenter though fully cognizant of the consenter's legal rights is coerced into consenting, a true waiver of rights is absent". Thus, a convincing argument can be made that an employee who submits to a urine, breath, blood, hair or other test involving the extraction of a bodily sample for the reason that a refusal to comply will result in loss of employment, demotion or the imposition of other disciplinary measures, cannot be considered to have waived his s. 8 constitutional rights.

testing cases rendered by the United States Supreme Court are controversial because the Court did not simply modify the probable cause requirement by lowering it to reasonable suspicion; it abandoned it in its entirety.[100] Although Canadian judges have stated that they are prepared to take a contextual approach to section 8 of the *Charter*, it is uncertain whether our courts will abandon the probable cause or other analogous standards with respect to mandatory testing.

Jackson v. Joyceville Penitentiary[101] is the sole Canadian decision that considers the constitutionality under section 8 of the *Charter* of mandatory drug testing. The issue before the Federal Court was the constitutionality of section 41.1 of the Penitentiary Service Regulations[102] pursuant to which penitentiary inmates were required to provide urine samples. The relevant provisions are as follows:

> 39. Every inmate is guilty of a disciplinary offence who
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> (a) disobeys or fails to obey a lawful order of a penitentiary officer,
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> . . . .
>
> (i.1) consumes, absorbs, swallows, smokes, inhales, injects or otherwise uses an intoxicant.
>
> 41.1.(1) Where a member considers the requirement of a urine sample necessary to detect the presence of an intoxicant in the body of an inmate, he may require that inmate to provide, as soon as possible, such a sample as is necessary to enable a technician to make a proper analysis of the inmate's urine using an approved instrument.
>
> (2) In any hearing in relation to a contravention of paragraph 39(i.1), evidence that a sample of urine taken and analysed in the manner referred to in subsection (1) contains an intoxicant establishes, in the absence of evidence to the contrary or in the absence of a reasonable explanation of the presence of the intoxicant, that the inmate who provided the sample has contravened paragraph 39(i.1).

Although the Court acknowledged that a reduced expectation of privacy exists in a prison environment, it nonetheless held that section 41.1 authorizes an unreasonable search and seizure in violation of section 8 of the *Charter*. The constitutional infirmity was found in the fact that the "regulation

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[100] *Skinner v. Railway Labor Executives Associations*, *supra*, note 67; and *National Treasury Employees Union v. Von Raab*, *supra*, note 67.

[101] [1990] 3 F.C. 55, 75 C.R. (3d) 174 (T.D.) (subsequent references are to [1990] 3 F.C.).

[102] C.R.C. 1978, c. 1251, s. 39(a), (i.1), as amended by SOR/85-412, Schedule, item 2; SOR 85/640, Schedule, item 4(1), and s. 41.1, as enacted by SOR/85-412, Schedule, item 3.

itself contains no standards, criteria, or circumstances relating to its application, for the guidance of staff or inmates, which would ensure that application is not unreasonable within the meaning of section 8".[103] The Federal Court was critical of the regulation for subjecting inmates "to the whim of any officer" "whether or not the officer had any reason to believe that the inmate was under the influence of an intoxicant".[104] The key factor which led to the striking down of section 41.1 was the presence of a discretionary power not constrained by any ascertainable criteria. Although the Court in *Jackson v. Joyceville Penitentiary*[105] did not specify the type of criteria necessary to satisfy section 8, it did state that the decision would not affect a scheme of random testing or testing of high risk groups provided it was governed by some criteria.

The flexibility of the probable cause requirement in Canadian constitutional law remains a subject of speculation. In light of the possibility that there will be a sliding scale of "cause" that is contingent upon the nature of the privacy interest being intruded upon, it is difficult to apply the administrative inspection decisions to drug and alcohol testing. There may be little objection to compelling the production of business documents when a state official subjectively determines that the production is necessary to facilitate the regulatory objectives; however, the provision of a urine, blood or breath sample more directly implicates the right of an individual to be left alone than the provision of business records, and it is this distinctive privacy interest that suggests that the state may be barred from intruding in the absence of some threshold level of cause.

4. SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(a) INTRODUCTION

The Commission will now examine the issue of whether workplace drug and alcohol testing programs violate section 7 of the *Charter*. Section 7 provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

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[103] *Jackson v. Joyceville Penitentiary*, *supra*, note 101, at 98.

[104] *Ibid.*, at 74.

[105] *Ibid.*

The Supreme Court of Canada has held that section 7 of the *Charter* provides one right, the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice.[106] For a constitutional challenge to be successful under section 7, it must first be established that the legislation or regulation that mandates testing has the effect of depriving an individual of her life, liberty or security of the person. It must then be demonstrated that the violation is not in accordance with the principles of fundamental justice.

The Supreme Court's current approach is to infuse substantive content into section 7 by conceptually linking it with the more certain and detailed rights enumerated in sections 8 to 14 of the *Charter*. As the Court stated in *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*,[107] these sections provide an "invaluable key to the meaning of 'principles of fundamental justice'";[108] "[s]ections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice".[109]

The Commission will now examine the components of section 7 in order to assess whether mandatory workplace testing programs contravene this provision of the *Charter*.

(b) Life, Liberty and Security of the Person

Although workplace drug and alcohol testing programs are varied, there is generally an irreducible core that is common to all the schemes. An individual is obliged to provide a sample, generally of urine, on the threat of a disciplinary sanction for a refusal to comply. In the event that the test result is positive, the individual is subjected to a disciplinary measure or is compelled to submit to treatment as a condition of continued employment. Although it may seem beyond dispute that this type of intervention into the life of an employee constitutes a deprivation of the liberty or security of the person, as a matter of constitutional law, the issues turn entirely on the scope of the judicial interpretation of the liberty and security interests.

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[106] See *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422 (subsequent references are to [1985] 2 S.C.R.); *R. v. Jones*, [1986] 2 S.C.R. 284, 31 D.L.R. (4th) 569; and *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 (subsequent references are to [1988] 1 S.C.R.).

[107] [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 (subsequent references are to [1985] 2 S.C.R.).

[108] *Ibid.*, at 503.

[109] *Ibid.*, at 502.

(i) The Right to Liberty

It is clear from the decisions rendered pursuant to section 7 of the *Charter* that the "right to liberty" encompasses deprivations of physical liberty, such as imprisonment.[110] Beyond instances of physical restraint, the Supreme Court of Canada has stated that the "right to liberty" is a phrase "capable of a broad range of meaning".[111]

The case law provides both a narrow and expansive construction of the scope of the liberty interest in section 7. For example, the British Columbia Court of Appeal in *R. v. Robson*[112] endorsed an expansive formulation of the liberty interest and stated in unequivocal terms that it is not to be restricted to freedom from bodily restraint. The Court cited the definition of liberty in the American case *Meyer v. Nebraska*:[113]

> [I]t denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

It was held in *R. v. Robson*[114] that the provision in the *Motor Vehicle Act*[115] which permitted a police officer to suspend an individual's licence for twenty-four hours on suspicion that the accused had consumed alcohol, violated the liberty interest in section 7. The Court stated that solely significant, not trivial, deprivations of liberty would be held to contravene section 7 – "not every interference with freedom of action and movement is a deprivation of liberty".[116] According to the Court, the facts of each case must be examined for the purpose of determining whether the liberty interest in section 7 is infringed.[117]

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[110] See, for example, *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, *supra*, note 107.

[111] *Singh v. Minister of Employment and Immigration*, *supra*, note 106, at 205.

[112] (1985), 28 B.C.L.R. (2d) 8, 19 D.L.R. (4th) 112 (C.A.) (subsequent references are to 28 B.C.L.R. (2d)).

[113] 262 U.S. 390, 43 S. Ct. 625 (1923).

[114] *Supra*, note 112.

[115] R.S.B.C. 1979, c. 288, s. 214, as re-enacted by 1982, c. 36, s. 32.

[116] *R. v. Robson*, *supra*, note 112, at 15.

[117] *Ibid.*

Wilson J. in *R. v. Morgentaler*[118] likewise adopted a broad definition of the liberty interest in section 7. Wilson J. reasoned that the *Criminal Code*[119] provisions on abortion deprived a woman of her liberty interest[120] because "an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state".[121]

In *Re Dion and the Queen*,[122] the issue before the Quebec Superior Court was the constitutionality under section 7 of the *Charter* of sections 39(a)(i.1) and 41.1 of the Penitentiary Service Regulations. As you can recall from our discussion of *Jackson v. Joyceville Penitentiary*,[123] these regulations stipulated that:

(1) it is a disciplinary offence for an inmate to consume an intoxicant; and

(2) a penitentiary employee who considered it "necessary" could require an inmate to provide a urine sample in order to ascertain the presence of an intoxicant in the body of an inmate.

The Quebec Court held that these regulations infringed the liberty guarantee in section 7. In an important passage, Galipeau J. states:[124]

> There is no doubt in the mind of the court that the wide and general meaning attributed by these courts to the word 'liberty' encompasses the right of a citizen to consume, if only on occasion, certain intoxicants and the right not to be subject to an obligation to provide a urine sample to whomever it is that wants to detect the presence of the intoxicant in his body. Any measure that seeks to prevent him, if only for his own pleasure, from using alcohol, for example, and imposes on him the obligation of submitting to a urine test in order to attempt to detect the presence of alcohol in his body, limits his fundamental right to liberty that is guaranteed by the Charter.

Likewise, the Federal Court in *Jackson v. Joyceville Penitentiary*[125] came to the conclusion that the impugned regulations limited an inmate's right to liberty in violation of section 7. Therefore, applying the principles articulated

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[118] *Supra*, note 106, at 171-72.

[119] R.S.C. 1970, c. C-34, s. 251.

[120] *R. v. Morgentaler*, *supra*, note 106, at 172.

[121] *Ibid.*, at 166.

[122] [1986] R.J.Q. 2196, 30 C.C.C. (3d) 108 (Que. S.C.) (subsequent references are to 30 C.C.C. (3d)).

[123] *Supra*, note 101.

[124] *Re Dion and the Queen*, *supra*, note 122, at 115.

[125] *Supra*, note 101.

in the above decisions, a convincing argument could be made that testing programs which require individuals to provide samples of bodily fluids constitute a deprivation of the liberty interest in section 7 of the *Charter*.

(ii) Security of the Person

In determining that the restrictions imposed by the *Criminal Code*[126] upon a woman's access to abortion constituted a deprivation of the security of the person, Dickson C.J.C. stated in *R. v. Morgentaler*[127] that "state interference with bodily integrity and serious state-imposed psychological stress" constitute a breach of security of the person. It could be argued that impairment occasioned by restricted access to abortion is a more severe interference with the security of the person than is mandatory drug and alcohol testing. Nevertheless, the two Canadian cases that have examined mandatory testing in the prison context subscribe to the view that such state-imposed stress constitutes an infringement of the security of the person in section 7. As Galipeau J. states in *Re Dion and the Queen*:[128]

> The right to the intimacy, to the discretion, and to the secrecy of acts of private life is part of the right to the security of the person. To require that the inmate provide a sample of his urine causes him humilation and constitutes an intrusion into the security, the tranquillity and the intimacy of his person.

Similarly, it was stated in *Jackson v. Joyceville Penitentiary*:[129]

> To require an inmate to provide a specimen of urine for purposes of testing for trace elements of intoxicants, as s. 41.1 provides, is, in my view, an interference with bodily integrity. Urinalysis may reveal health or other conditions beyond the indications sought for traces of unauthorized intoxicants. In many cases requiring a specimen for testing aside from health reasons might lead to a measure of psychological stress, particularly where, as here, the procedure for collecting the sample involves direct observation by another. The requirement deprives the inmate concerned of security of his or her person.

Thus, a court may be persuaded that a statute or regulation that requires employees to provide samples of their urine, blood, hair, saliva or breath violates the right to security of the person in section 7 of the *Charter*.

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[126] *Supra*, note 119.

[127] *Supra*, note 106, at 56.

[128] *Supra*, note 122, at 117.

[129] *Supra*, note 101, at 103.

(c) Does Section 7 Protect Economic Rights?

An important issue that remains unresolved is whether section 7 protects an individual's interest in employment. In other words, can it be successfully argued that section 7 is engaged in circumstances in which a positive test result may lead to the loss of employment by an individual?

The Supreme Court of Canada has not authoritatively decided this issue. For example, the Supreme Court in *Irwin Toy Ltd. v. Quebec (Attorney General)*[130] made the following statement:

> The intentional exclusion of property from s. 7, and the substitution therefor of 'security of the person' has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term 'property' are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within 'security of the person'. Lower courts have found that the rubric of 'economic rights' embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property – contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.

Some lower courts have held that section 7 does not protect economic rights, such as the right to one's job.[131] However, in *Wilson v. Medical Services Commission of B.C.*,[132] the British Columbia Court of Appeal held that the right of an individual to practise her profession is guaranteed in section 7 of the *Charter*. This case involved a challenge to legislation limiting the ability of new doctors to obtain unrestricted "practitioner numbers" for the purpose of billing the Medical Services Plan for services rendered. The Court stated that the right of doctors to practise their profession is guaranteed by the liberty interest in section 7.[133]

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[130] [1989] 1 S.C.R. 927, at 1003-04, 58 D.L.R. (4th) 577, at 632-33 (subsequent references are to [1989] 1 S.C.R.) (hereinafter referred to as "Irwin Toy").

[131] *Re Homemade Winecrafts (Canada) Ltd. and Attorney General of British Columbia* (1986), 26 D.L.R. (4th) 468 (B.C.S.C.); *Re Abbotsford Taxi Ltd. and Motor Carrier Commission* (1985), 23 D.L.R. (4th) 365 (B.C.S.C.); and *Re Aluminum Co. of Canada and The Queen in right of Ontario* (1986), 55 O.R. (2d) 522, 29 D.L.R. (4th) 583 (Div. Ct.); leave to appeal to Ont. C.A. refused (1986), 19 Admin L.R. xliii (note) (Ont. C.A.).

[132] (1988), 30 B.C.L.R. (2d) 1, 53 D.L.R. (4th) 171 (C.A.); leave to appeal to S.C.C. refused (1988), 92 N.R. 400n (S.C.C.) (subsequent references are to 30 B.C.L.R. (2d)) (hereinafter referred to as "*Wilson*").

[133] *Ibid.*, at 25.

It is important to note, however, that *Wilson* distinguishes between a right to work, which it stated is not guaranteed by section 7, and the right to pursue a livelihood or profession, which is protected by the Constitution because of its connection with an individual's identity and self-worth.[134] Moreover, the British Columbia Court stated that legislation that regulates a profession (as opposed to prohibiting individuals from practising their profession) does not infringe section 7. As the Court states:[135]

> We have no doubt that regulation of such matters as standards of admission, mandatory insurance for the protection of the public, and standards of practice of behaviour will not constitute an infringement of s. 7.

An examination of the decisions rendered in Ontario demonstrates that the courts have not been receptive to the argument that section 7 guarantees an individual the right to practise his profession.[136] Similarly, Lamer J., in *Reference re Sections 193 and 195.1(1)(c) of the Criminal Code*,[137] the sole judge in this case to consider the issue of whether the right to liberty or security could provide an interest with an economic component, stated:

> In my view, it is not clear that the statement by the Chief Justice, quoted at length by the B.C. Court of Appeal in *Wilson*, is support for the view that s. 7 of the *Charter* protects a 'right to pursue a livelihood or profession' as distinct from a 'right to work' which is not protected.... There is no doubt that the non-economic or non-pecuniary aspects of work cannot be denied and are indeed important to a person's sense of identity, self worth and emotional well-being. But it seems to me that the distinction sought to be drawn by the Court between a right to work and a right to pursue a profession is, with respect, not one that aids in an understanding of the scope of 'liberty' under s. 7 of the *Charter*.

The cases discussed above illustrate that uncertainty persists as to whether section 7 protects economic interests. Therefore, it is difficult to predict whether the Supreme Court will hold that mandatory drug and alcohol testing in the workplace violates section 7 because of the impact of such testing on an individual's employment.

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[134] *Ibid.*, at 21, 24.

[135] *Ibid.*, at 21.

[136] See, for example, *R. v. Miles of Music Ltd.* (1989), 74 O.R. (2d) 518, 48 C.C.C. (3d) 96 (C.A.); and *Arlington Crane Service Ltd. v. Ontario (Minister of Labour)* (1988), 67 O.R. (2d) 225, 56 D.L.R. (4th) 209 (H.C.J.). Indeed, in the case of *Jamorski v. Ontario (Attorney General)* (1988), 64 O.R. (2d) 161, at 168, 49 D.L.R. (4th) 426, at 433 (C.A.), a challenge to Ontario regulations governing the admission of internship brought by foreign-trained doctors, Zuber J.A. observed that "[t]here is no constitutional right to practise medicine".

[137] [1990] 1 S.C.R. 1123, at 1170, [1990] 4 W.W.R. 481, at 520.

(d) FUNDAMENTAL JUSTICE

In the event that state-imposed drug and alcohol testing is considered by the courts to infringe one of the interests protected by section 7, the legislation will only be held to violate section 7 if it fails to accord with principles of fundamental justice.

As the Supreme Court stated in *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*,[138] the principles of fundamental justice are not a protected interest but rather a qualifier of the right not to be deprived of life, liberty and security of the person. The phrase serves to establish the parameters of the right.[139] The Court stated that:[140]

> [t]he principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system.

The principles of fundamental justice have both a procedural and a substantive component. With respect to the procedural component, the principles of fundamental justice are similar to common law notions of procedural fairness.[141]

To date, the courts have not developed substantive principles of fundamental justice outside the context of criminal law. Observers state that this is attributable to the fact that courts do not wish to trespass upon the legitimate domains of the legislature in making choices in matters of social policy. Accordingly, there is little guidance as to which components of the legal system are of such a fundamental nature to be elevated to the status of constitutional requirements.

With respect to the issue of whether drug and alcohol testing violates the principles of fundamental justice in section 7, the courts will likely scrutinize whether the particular mandatory testing scheme is arbitrary and, as well, whether the program infringes principles of procedural due process.

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[138] *Supra*, note 107.

[139] *Ibid.*, at 501.

[140] *Ibid.*, at 503.

[141] See *Singh v. Minister of Employment and Immigration*, *supra*, note 106, at 212-13.

(i) Arbitrariness

In examining whether a drug and alcohol testing program is arbitrary, the court will likely assess whether the testing scheme is irrational and whether it is so fraught with discretion that it opens the door to abuse.

In *Re Dion and the Queen*[142] and *Jackson v. Joyceville Penetentiary*,[143] the respective courts came to the conclusion that because of the absence of governing criteria – it was completely within the discretion of the prison authorities to compel inmates to provide urine samples – the testing regulations governing prison inmates infringed section 7 of the *Charter*. In holding section 41.1 of the Penitentiary Service Regulations to be of no force or effect as it gave arbitrary powers to penitentiary officials, the Court in *Re Dion and the Queen*[144] stated:

> Looking closely at the text of s. 41.1 of the Regulations, one quickly realizes that any civil servant or employee of the penitentiary service can *require* an inmate to provide him with a urine sample as soon as he considers such requirement *necessary* to detect the presence of an intoxicant in his body. One then wonders at what time and for what reason, a member would believe that he is in a position to consider such requirement necessary? Will one person's necessity be that of another's? What criteria will the 'member' refer to in deciding whether it is necessary?
>
> Necessity for one person may depend on subjective factors which, if such factors are absent for another person, will change the necessity into inutility. One can consider it necessary to require a urine sample when the inmate in question exhibits all the signs of a drug user. But, one can also out of malice, a spirit of vengeance, or simple ignorance, submit an innocent person to the harassment, the bother, the torment, the insult, or the humiliation, of suffering one or multiple requests for urine samples, which will always give negative results.
>
> Section 41.1, as drafted, gives an officer or employee of the penitentiary service the absolute power to require a urine sample, even if the inmate does not present any danger of committing discipline breaches or acts linked to the absorption of intoxicants.
>
> In these cases, the absence of the evil which is sought to be proscribed, will make the State's intervention a serious infringement of one of the accused's constitutional rights, because it is not in accordance with the principles of fundamental justice.

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[142] *Supra*, note 122.

[143] *Supra*, note 101.

[144] *Supra*, note 122, at 119-20.

> In fact, this section, in its present form, does not contain the essential elements of fundamental justice because it does not ensure an inmate of protection against the abuse, that he may be the victim of, by one of the 'members' of the penitentiary service. Arbitrariness has always been, and will always be, contrary to fundamental justice.

In addition, Galipeau J.[145] suggested that testing programs will satisfy the principles of fundamental justice if testing is permitted solely in circumstances where there are reasonable and probable grounds to believe the individual is impaired. Galipeau J. stated:[146]

> Section 41.1 of the Regulations as drafted, and in particular, its first paragraph, cannot have the force of law as it gives arbitrary powers to those whose duty it is to apply it.
>
> If it were amended in order to read in the same manner as the provisions of the *Criminal Code*, where peace officers are given the power to arrest an individual if they have reasonable and probable grounds to believe that an offence has been committed or is about to be committed (ss. 234.1, 235(1), 449(1)(*b*), 450(1)(*a*), etc.), it would then meet the requirements of the Charter because it would then be in accordance with the principles of fundamental justice (s. 7), and be a reasonable limit which could be demonstrably justified in a free and democratic society (s. 1).

However, the Federal Court in *Jackson v. Joyceville Penetentiary*[147] seems to imply that although the reasonable and probable cause standard will satisfy the fundamental justice requirement in section 7, a lesser threshold may also be constitutionally valid:

> While there is but a limited privacy and protection of bodily integrity, and expectation of those in the prison setting, what remains, including freedom from state examination of bodily wastes without consent, ought not to be taken away except in accord with principles of fundamental justice. Here the absence of criteria for requiring a specimen, while that may not lead to abuse by reasonable staff members, provides no standards for determining when abuse arises, it is not tied to reasonable and probable cause even where that is the basis on which the requirement is ordered, or to any other standard or circumstance that would reasonably support the requirement in light of its explained purposes. No provision is made for advising the inmate why the specimen is required, or for the inmate, in circumstances such as those relied upon here where a staff member believes or suspects the inmate has consumed an intoxicant, to explain his conduct or action before a decision is finally made to require the specimen.

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[145] *Ibid.*, at 122-23.

[146] *Ibid.*, 123.

[147] *Supra*, note 101, at 103-04.

> Without reference to any objective criteria, section 41.1 does not permit officers or inmates to know the circumstances in which a urine sample may be required. I conclude that section 41.1 of the Regulations, in so far as it authorizes a requirement for an inmate to provide a urine specimen where it is believed the inmate has ingested an intoxicant, contravenes section 7 of the Charter. This is because the restrictions on rights to liberty and security of the person are not, in the absence of standards or criteria or applicable circumstance, in accord with the principles of fundamental justice.

Another argument in favour of the position that testing programs do not satisfy the principles of fundamental justice, is that the testing techniques currently used in the workplace are irrational. For instance, urinalysis, as well as blood and saliva testing are not capable of differentiating between impaired and non-impaired employees. In other words, the link between drug testing and job performance is extremely tenuous. The failure to accurately identify impaired employees undercuts the very justification for the intrusion and therefore a court may be convinced that the testing methods do not meet the standards of fundamental justice.

(ii) Procedural Due Process

Section 7 requires that a testing scheme be in accordance with the principles of procedural due process. Natural justice is the minimum content of section 7[148] and the courts will invalidate legislative schemes that are constitutional in substance but deficient in a procedural sense. In *R. v. Morgentaler*,[149] the Supreme Court found that the procedures specified in the *Criminal Code*[150] – that a woman desiring an abortion have the matter decided by a therapeutic committee – violated the principles of fundamental justice. The procedures mandated by the impugned provision were unavailable to many women and caused undue delay, which resulted in psychological trauma as well as medical complications.[151]

Beyond the concern for rational process is the requirement that natural justice be respected by allowing the individual to contest the allegation in a meaningful way. In order to ensure that this component of fundamental justice is satisfied, the legislature should require that testing schemes contain

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[148] *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, 84 D.L.R. (4th) 105.

[149] *Supra*, note 106.

[150] *Supra*, note 119.

[151] See commentary by Stratas, *supra*, note 90, §17:19[4], at 17-32.9.

sufficient procedural safeguards including confirmatory testing, sufficient notice requirements, and an opportunity to rebut a positive test result.

5. SECTION 1 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(a) INTRODUCTION

The purpose of this section is to consider whether legislation mandating drug and alcohol testing will be upheld under section 1 notwithstanding that the legislation infringes a *Charter* right. Section 1 of the *Charter* provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The basic framework for applying section 1 was set out by the Supreme Court of Canada in *R. v. Oakes*.[152] The Court held that in order to satisfy section 1, it must be demonstrated that the legislative objective is sufficiently important to justify the infringement of the rights, and that the means chosen are reasonable and justified in terms of the objectives sought. The *R. v. Oakes* test was elaborated upon in *R. v. Edwards Books and Art Ltd.*:[153]

> Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a 'pressing and substantial concern'. Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally, has three aspects: the limiting measures must be carefully designed, or rationally connected to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

Our discussion of section 1 in relation to drug and alcohol testing in the workplace will be structured around the framework established in *R. v. Oakes*.[154] The Commission will first examine whether the problem of drug and alcohol abuse is sufficiently pressing to justify infringements of an individual's constitutional rights. On the assumption that it is established that

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[152] [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

[153] [1986] 2 S.C.R. 713, at 768, 35 D.L.R. (4th) 1, at 41.

[154] *Supra*, note 152.

drug and alcohol abuse in the workplace meets the "pressing and substantial concern" test, we will then consider whether current testing programs are rationally connected to their objective. Finally, the Commission will examine whether there are other effective methods available to the government which would result in less impairment to the constitutional rights of individuals who are subjected to workplace testing.

(b) The Severity of Drug and Alcohol Abuse in the Workplace - A Pressing and Substantial Concern?

The state may encounter difficulty in satisfying the first part of the *R. v. Oakes*[155] test, namely, that drug and alcohol abuse in the workplace is so pressing and substantial that it warrants a mandatory testing program. There is a lack of empirical evidence supporting the allegation that drug use in the workplace is a serious problem.[156] The Niagara Institute, which was commissioned by Health and Welfare Canada to study the problem of substance abuse in the workplace, concluded that: (1) drug use had not reached serious proportions; and (2) alcohol problems amongst employees, although significant, were adequately being addressed by current non-testing programs.[157] In addition, Transport Canada conducted a study of workplace substance abuse and arrived at a similar conclusion. It found that "there is a relatively small group of people in each occupation studied who report using alcohol or drugs while at work" and that "alcohol is clearly the substance that shows the highest reported usage and safety related negative effects".[158]

It is difficult to predict the quantum of evidence which the Supreme Court will require in order for the state to establish a pressing and substantial objective. In some cases, the Court has required a substantial

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[155] *Ibid.* See Canadian Bar Association, *Report of the Canadian Bar-Ontario Committee to Study the Implications of Mandatory Drug Testing in the Workplace* (July 1987), at 25.

[156] See Addiction Research Foundation, *Workplace Drug and Alcohol Testing: Where to Draw the Line* (Toronto: February 1991), and S. Chapnik, "Mandatory Drug Testing In The Workplace" (1989), 5 Admin. L.J. 102, at 103. According to B.H. Cunningham, senior program consultant at the Addiction Research Foundation, alcohol and drug use in Ontario peaked in the late 1970s and has been stable or in decline since then. See Cunningham, "Substance Abuse – The Hidden Brain Drain", presentation on substance abuse in the workplace at Insight Seminar on *Drugs and Alcohol in the Workplace[:] Creating and Implementing Effective Corporate Policy* (Toronto: May 28, 1992), and "Jar Wars" (editorial), *The Toronto Star*, September 25, 1990, A16.

[157] Health and Welfare Canada, *A Report of the National Consultation on Substance Abuse and the Workplace* (1988), at 21.

[158] Heffring Research Group, *Substance Use in Transportation[:] Marine, Airports, Aviation, Surface (Bus/Trucking)[:] Overview Report* (1990), at 15.

body of evidence[159] and, in other decisions, it has simply made assumptions with regard to the significance of the social problem.[160] Although parallels do exist between breathalyzer testing of suspected drunk drivers and urine testing of employees, a significant distinction between the related schemes is the fact that the *Criminal Code*[161] only contemplates the taking of breath samples upon reasonable and probable grounds that an offence has been committed. The taking of a blood sample is similarly restricted with the additional requirement in the *Criminal Code*[162] that blood may be extracted only in circumstances in which the taking of a breath sample is impracticable or impossible. It is interesting to note that although breath testing is subjected to a probable cause requirement, a number of other constitutional violations have been found by the courts, including violations of the right to counsel,[163] the right to be free from arbitrary detention,[164] and the right to be presumed innocent.[165] Nonetheless, the Supreme Court has upheld these violations under section 1. This can be attributed in large part to the voluminous amount of statistics that demonstrate the severity of the problem of drivers under the influence of alcohol on public roads.

In summary, the state must demonstrate that alcohol and drug abuse in the workplace constitutes a pressing and substantial problem, one in which the safety of the public and other employees is seriously at risk. As previously discussed, there is little empirical support for the argument that drug use by employees is a prevalent or serious problem in the Ontario or Canadian workforce. Even if a court comes to the conclusion that alcohol is a significant problem in the workplace, it is uncertain whether a mandatory testing program will satisfy the proportionality test under section 1 of the *Charter*.

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[159] See *Reference re Sections 193 and 195.1(1)(c) of the Criminal Code*, *supra*, note 137; and *Irwin Toy Ltd.*, *supra*, note 130.

[160] See *R. v. Lee*, [1989] 2 S.C.R. 1384, 52 C.C.C. (3d) 289, and *R. v. Edwards Books and Art Ltd.*, *supra*, note 153.

[161] R.S.C. 1985, c. C-46, ss. 254(2), (3).

[162] See *ibid.*, s. 254(3)(b).

[163] *R. v. Thomsen*, [1988] 1 S.C.R. 640, 40 C.C.C. (3d) 411.

[164] *R. v. Hufsky*, [1988] 1 S.C.R. 621, 40 C.C.C. (3d) 398.

[165] *R. v. Whyte*, [1988] 2 S.C.R. 3, 51 D.L.R. (4th) 481.

(c) Proportionality Test

(i) The Accuracy and Effectiveness of Testing - A Rational Connection?

The courts will not permit a legislature to combat a recognized social evil by a method that is flawed and tenuously related to its overall objective. In this regard, there have been a number of claims that have been made with respect to the effectiveness of current testing technologies and, in particular, urinalysis, as it is the most pervasively used testing technique in the North American workplace.[166]

The first claim relates to the accuracy of testing. It is argued that testing techniques, such as urinalysis, result in an unacceptably high number of false positives. Although certain types of testing, for instance the EMIT screening test, will produce high false positives, a urine sample that is subjected to the confirmatory procedure of gas chromatography/mass spectrometry is capable of yielding reliable results. Nonetheless, GC/MS is labour intensive and although the possibility of technological error is minimized, the possibility of human error is increased.[167] In order to ensure that urine samples produce accurate results, it is incumbent on the state to promulgate legislation that addresses such matters as chain of custody, and the licensing and certification of laboratories. Furthermore, it should be understood that the practice of mass random testing produces the greatest accuracy problems – the greater the number of samples that are tested, the greater the likelihood of error.

A far more significant problem with respect to efficiency is found in the interpretation of tests that can otherwise be assumed to be accurate. As discussed in detail in chapter 2, there is no scientific connection between a positive drug test and current employee impairment. Current testing techniques, such as urine, blood and saliva testing, are not capable of establishing drug impairment of an individual. Therefore, drug testing cannot perform its designated function of identifying employees who are impaired on the job. A positive test cannot indicate current impairment nor can it

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[166] S. Chapnik, *supra*, note 156, at 103; and Addiction Research Foundation, *Issues Related to Drug Screening in the Workplace*, by S. Macdonald, S. Wells, and R. Fry (March 1992) (draft manuscript), at 11-12; T.E. Ullrich, "A Drug-free American Workplace and the Virginia Employer" (1989), 15 Va. B.A.J. 5; Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: 1990); Ontario, Information and Privacy Commissioner, *Workplace Privacy[:] A Consultation Paper* (Toronto: June 1992); A. Abbey and C. Redel, "Drug Testing in the Workplace: Public and Private Sector Employers and the Courts" (1991), Lab. L.J. 239, at 240; and S.S. Cairns and C.V. Grady, "Drug Testing in the Workplace: A Reasoned Approach for Private Employers" (1990), 12 Geo. Mason U.L. Rev. 491, at 495.

[167] D.G. Evans, *Drug Testing Law Technology and Practice* (New York: Clark/Boardman/Callaghan, 1990, looseleaf), §5.01, at 9-10.

establish whether the employee is a chronic or casual user of drugs.[168] It is difficult to imagine a court upholding a *Charter* violation as a reasonable limit under section 1 when the impugned violation does not rationally address the social problem in question.

(ii) The Least Restrictive Means

The next matter that must be addressed under the proportionality test is whether drug and alcohol testing constitutes the least restrictive means of achieving the legislative objective. As the Supreme Court has stated in *R. v. Oakes*, it is incumbent upon lawmakers to choose a statutory scheme that intrudes the least upon the constitutional rights of an individual.[169]

A review of the Supreme Court decisions rendered in the past few years demonstrates that the minimal impairment test articulated in *R. v. Oakes* may not be applied strictly in certain circumstances. As La Forest J. states in *Black v. Law Society of Alberta*:[170]

> The legislature must be given sufficient scope to achieve its objective. As I noted in *R. v. Edwards Books and Art Ltd.*, at p. 795, in struggling with questions of social policy and attempting to deal with conflicting pressures, 'a legislature must be given reasonable room to manoeuvre ...'. The term 'reasonable limit' is used in s. 1 and must be given meaning. Inherent in the word 'reasonable' is the notion of flexibility. Section 1 does not advocate perfection.

The Supreme Court of Canada in *Irwin Toy Ltd.*[171] attempted to delineate the circumstances in which the judiciary ought to apply a less stringent minimal impairment test. The Court stated that the meaning to be attributed to "'as little as possible' will... vary depending on the government objective and on the means available to achieve it".[172] A distinction was made in *Irwin Toy* between socio-economic or regulatory areas where the government is mediating between competing groups, and cases where the dynamic is clearly the government vis-à-vis the individual whose rights are

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[168] See discussion in ch. 2 of this Report.

[169] *Supra*, note 152.

[170] [1989] 1 S.C.R. 591, at 627-28, 58 D.L.R. (4th) 317, at 348. In *Black*, the Court considered whether particular rules of the Law Society of Alberta, which violated s. 6 of the *Charter*, were justified under s. 1 of the *Charter*. It is noteworthy that despite La Forest J.'s *dicta* on the minimal impairment test, he decided that the impugned rules were not justified under s. 1, in part, because of the availability of less intrusive ways in which the Law Society's objectives could be met. See Stratas, *supra*, note 90, §6:08, at 6-19.

[171] *Supra*, note 130.

[172] *Ibid.*, at 993.

being infringed. In the former case, a less stringent test might be applied, whereas in the latter context, adherence to the strict test must be maintained.[173]

It is important to note that the Supreme Court has been inconsistent in its application of the distinction made in *Irwin Toy*. For example, in *United States of America v. Cotroni; United States of America v. El Zein*,[174] the Court advocated that a "flexible approach" ought to be taken to the justification test in section 1 in the context of an extradition case. The Court held that the extradition of accused persons, who could be tried in Canada for offences which were committed in Canada, impaired the complainants' rights as little as reasonably possible. By contrast, Wilson J., strictly applying the *Oakes* test, came to the conclusion that the minimal impairment test was not met. As Stratas comments in *The Charter of Rights In Litigation*[175]:

> With respect, the application of the minimal impairment test by the majority of the Court in this case does appear to be a very lax application. The latitude given to the government in this case seriously calls into question whether the minimal impairment test poses any obstacle to the exercise of governmental discretion, at least in the area of extradition.

Similarly, in *R. v. Chaulk*,[176] the Court applied a less stringent minimal impairment test in its deliberation as to whether a provision of the *Criminal Code*,[177] which placed the burden of establishing the insanity defence upon the accused, was justified under section 1 of the *Charter*. In the words of Lamer C.J., "Parliament is *not* required to search out and to adopt the absolutely least intrusive means of attaining its objective".[178] However, Wilson J., in a strong dissent, stated that the context was inappropriate for legislative deference because this was the "quintessential case of the state acting as the 'singular antagonist'".[179] Madam Justice Wilson also expressed the view that *Irwin Toy*:[180]

> does not stand for the proposition that in balancing the objective of government against the guaranteed right of the citizen under s.1 different levels of scrutiny may be applied depending upon the nature of the right. The prerequisite for the

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[173] *Ibid.*

[174] [1989] 1 S.C.R. 1469, 48 C.C.C. (3d) 193.

[175] Stratas, *supra*, note 90, §6:08, at 6-21.

[176] [1990] 3 S.C.R. 1303, [1991] 2 W.W.R. 385 (subsequent references are to [1990] 3 S.C.R.).

[177] *Supra*, note 161.

[178] *Ibid.*, at 1341 (emphasis added).

[179] *Ibid.*, at 1390.

[180] *Ibid.*, at 1388-89.

> exception to the minimal impairment test in *Oakes*, as I understand *Irwin Toy*, is that the guaranteed right of different groups of citizens cannot be fully respected; to respect to the full the right of one group will necessarily involve an infringement upon the right of the other. In such a circumstance *Irwin Toy* holds that it is appropriate for the government to fashion a compromise on the basis of policy considerations.

Edmonton Journal v. Alberta (Attorney General)[181] is a further example of a Supreme Court decision that does not apply the principles articulated in *Irwin Toy*. The Supreme Court in this case adhered to a strict application of the minimal impairment test despite the fact that the context was a family law matter in which privacy interests were being balanced against the right of the public to be informed. At issue was the constitutionality of section 30 of the *Judicature Act*[182] which prohibited the reporting of matrimonial proceedings. As Stratas observes:[183]

> the use of the strict approach is unusual, given the fact that this case involved a balancing of the interests of two groups (the press and the public versus family law litigants). In *Irwin Toy*, the Court stated that the less strict approach should be employed in such cases.

The Commission is of the view that regardless of whether a court adopts a strict or a more flexible approach to the minimal impairment test, it will be difficult to successfully argue that workplace testing of bodily samples satisfies this branch of the section 1 test. If work safety is the goal of the legislature, then one must ask why a legislature would choose the invasive options of urine and blood testing when far less intrusive and more reliable methods exist for detecting job impairment. For example, physical coordination tests are capable of detecting impaired employees who are about to embark upon safety-sensitive tasks.[184]

An analogy can be drawn to the state response to the problem of drunk driving. Although breath and blood samples can only be demanded upon a showing of probable cause under the *Criminal Code*,[185] the police are permitted to use physical impairment tests to establish the presence of reasonable and probable cause. The use of physical impairment tests has been held to constitute a reasonable limitation of the constitutional right to

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[181] [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577.

[182] R.S.A. 1980, c. J-1.

[183] Stratas, *supra*, note 90, §6:08, at 6-21.

[184] See discussion of performance/fitness testing in ch. 7 of this Report.

[185] *Supra*, note 161.

counsel[186] and this is largely a recognition by the judiciary that this type of testing is not as invasive as a demand for the production of bodily fluids. It would seem paradoxical to allow employers to significantly invade the privacy rights of individuals by a method that cannot even prove the presence of the evil to be combatted, particularly when there is a less invasive testing procedure that bears a much greater rational connection to the problem of job impairment.

Another problem relating to the least restrictive means is the issue of mass random testing. As previously discussed, random testing of employees may constitute an infringement of section 8 of the *Charter* because of the absence of any guiding criteria to constrain the discretion of the employer. There is a line of cases which suggest that the absence of any stated criteria can never support a section 1 justificatory argument because the limit would neither be one prescribed by law nor represent the least restrictive alternative. In *Jackson v. Joyceville Penitentiary*,[187] the Federal Court held that because the Penitentiary Service Regulations did not contain any standards or criteria for its application, it was open to arbitrary application, and thus could not constitute a reasonable limitation prescribed by law within section 1 of the *Charter*. A standardless legislative scheme is considered to be more restrictive of rights than a scheme that provides some criteria as it provides the opportunity for discrimination and harassment.[188]

(iii) Proportionality Between Objective and the Injurious Effects of the Legislation

A final consideration to be examined with respect to the proportionality test is the sanctions imposed on employees who test positive on drug and alcohol tests. Proportionality must exist between the importance of the objective and the injurious effects of the legislation.[189] For instance, legislation that permits an employer to immediately discharge an employee who tests positive may not satisfy this branch of the *R. v. Oakes* test. The worker may have a substance abuse problem that could be remedied by

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[186] *R. v. Bonin* (1989), 47 C.C.C. (3d) 230, 11 M.V.R. (2d) 31 (B.C.C.A.); leave to appeal to S.C.C. refused 50 C.C.C. (3d) vi (B.C.C.A.); and *R. v. Saunders* (1988), 27 O.A.C. 184, 41 C.C.C. (3d) 532 (Ont. C.A.).

[187] *Supra*, note 101. See, also, *Thwaites v. Health Services Centre* (1988), 51 Man. R. (2d) 196, 48 D.L.R. (4th) 338 (C.A.).

[188] B. Feldthusen, "Urinalysis Drug Testing: Just Say No" (1988), 5 Can. Hum. Rts. Y.B. 81, at 101, is of the opinion that mass testing would likely not meet the s. 1 test in *R. v. Oakes*, *supra*, note 152.

[189] *R. v. Oakes*, *ibid.*; *R. v. Smith*, [1987] 1 S.C.R. 1045, 40 D.L.R. (4th) 435; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68; and *R. v. Hess*; *R. v. Nguyen*, [1990] 2 S.C.R. 906, [1990] 6 W.W.R. 289.

counselling and treatment through an employee assistance program. It may be argued that deprivation of livelihood in such circumstances constitutes an excessive response to an employee's medical problem.

6. CONCLUSION

It is difficult to predict how the courts will apply section 1 of the *Charter* to the issue of mandatory drug and alcohol testing in the workplace. The Commission is of the view that the state will likely encounter difficulty in establishing that drug abuse is a pressing and substantial problem in the Ontario workforce. In addition, it will be difficult to convince a court that such testing is a rational or effective method of reducing job impairment. Finally, given that other less intrusive methods exist to detect impairment, a strong argument could be made that testing the bodily fluids of employees does not constitute the least restrictive means of achieving the objectives of the legislature.

It is also worth noting that there are *dicta* in the decisions of the Supreme Court with respect to the relationship between section 7 and section 1, and between section 8 and section 1 of the *Charter*. For example, Wilson J. has opined in both *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*[190] and *R. v. Jones*[191] that a provision which violates section 7 cannot be "reasonable" or "demonstrably justified" within the meaning of section 1. Similarly, La Forest J. stated in *Thomson Newspapers*[192] that the Court's analysis under section 7 bears a resemblance to the analysis under section 1 of the *Charter*.[193] As far as the relationship between section 8 and section 1 of the *Charter* is concerned, Wilson J. stated in *Thomson Newspapers*[194] that it is difficult to understand how any legislation authorizing an "unreasonable search and seizure" could be a "reasonable limit demonstrably justified in a free and democratic society".[195]

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[190] *Supra*, note 107.

[191] *Supra*, note 106.

[192] *Supra*, note 85.

[193] See Stratas, *supra*, note 90, §17:12, at 17-22.

[194] *Supra*, note 85.

[195] See discussion in Stratas, *supra*, note 90, §6:18, at 6-45. See, also, Martin J.A. in *R. v. Noble* (1984), 48 O.R. (2d) 643, 14 D.L.R. (4th) 216 (C.A.).

CHAPTER 6

THE ONTARIO HUMAN RIGHTS LEGISLATION

1. INTRODUCTION

Unlike the *Canadian Charter of Rights and Freedoms*,[1] human rights legislation, both federally and provincially, applies to private sector as well as to public sector employees. In this chapter, the Commission will examine the issue of whether workplace drug and alcohol testing constitutes discrimination in employment pursuant to the Ontario *Human Rights Code*.[2] The Commission will then discuss the defences under the *Code* likely to be invoked by an employer as justification for a mandatory testing program.

2. DISCRIMINATION ON THE GROUNDS OF HANDICAP

The Ontario *Human Rights Code* prohibits discrimination in employment. Section 5(1) of the *Code* provides:[3]

> 5.-(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or *handicap*.

Section 5 applies both to job applicants as well as to current employees.[4] The general philosophy of the legislative provision is that individuals must be assessed by their particular ability to perform their job; individuals must not

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[1] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, c. 11 (U.K.).

[2] R.S.O. 1990, c. H.19 (hereinafter referred to as the "*Code*"). See J. Armstrong, "Rights agency probes firm's drug testing", *The Toronto Star* (January 9, 1992) A4; V. Galt, "Imperial Oil drug-testing plan challenged", *The Globe and Mail*, Toronto (December 17, 1991) A6; K. Cox, "Mandatory drug tests irk crews", *The Globe and Mail*, Toronto (May 6, 1992) A1; and P. Waldie, "Commission asked to rule on drug tests", *The Globe and Mail*, Toronto (November 18, 1991) A6.

[3] *Supra*, note 2 (emphasis added).

[4] *Ibid.*, s. 23.

be discriminated against on the assumption that their handicap will prevent them from executing their work in a competent manner.[5]

Handicap is defined broadly in section 10(1) of the *Code*[6] to include an illness which a person actually has or is perceived to have:

> 10.-(1) ...
>
> 'because of handicap' means for the reason that the person has or has had, or is believed to have or have had,
>
> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,
>
> (b) a condition of mental retardation or impairment,
>
> (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> (d) a mental disorder, or
>
> (e) an injury or disability for which benefits were claimed or received under the *Workers' Compensation Act*.

In contrast to the *Canadian Human Rights Act*,[7] the Ontario *Human Rights Code*[8] does not specifically designate drug and alcohol dependency as a handicap within the meaning of the *Code*. However, it is argued that since

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[5] B. Feldthusen, "Urinalysis Drug Testing: Just Say No" (1988), 5 Can. Hum. Rts. Y.B. 81, at 103; and S. Chapnik, "Mandatory Drug Testing In The Workplace" (1989), 5 Admin. L.J. 102, at 105.

[6] *Supra*, note 2.

[7] R.S.C. 1985, c. H-6, s. 25 "disability". See, also, *Niles v. Canadian National Railway Co.* (1991), 37 C.C.E.L. 58 (Can. Hum. Rts. Tribunal); rev'd (unreported) July 2, 1992, Fed. C.A. (Appeal No. A-481-91).

Note that the federal legislation uses the term "disability" rather than "handicap". Section 25 of the *Canadian Human Rights Act* provides:

> 'disability' means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug.

[8] *Supra*, note 2.

drug or alcohol dependency is an illness which results in physical or mental infirmity, it falls within the definition of "handicap" under the Ontario human rights legislation.[9] Thus, an individual in such circumstances is entitled to be protected against discrimination in the workplace by virtue of section 5(1). In fact, the Ontario Human Rights Commission has issued a policy statement which designates drug or alcohol dependency as a "handicap" within the meaning of the *Code*. The policy statement reads:[10]

> The *Code* adopts an expansive definition of the term 'handicap'. Included are numerous physical and mental disabilities. The following examples represent ways in which the use of legal and illicit drugs or alcohol may fall within the *Code*'s definition of 'handicap':
>
> 1. Where an individual's use of drugs or alcohol has reached the stage that it constitutes an addiction or dependency.
>
> 2. Where an individual is perceived as having an addiction or dependency due to drug or alcohol use.
>
> Such a perception could be held by an employer without in fact being true. For example, an employer may interpret a positive test of a casual drug user to mean that the individual has a drug addiction or dependency. If the employer were to take action as a result of this inaccurate perception, the individual's right to equal treatment under the *Code* may have been infringed.

Similarly, the Canadian Human Rights Commission has issued the following policy statement:[11]

> a) Drug Dependence
>
> A disability, as defined in the Act, includes previous or existing dependence on alcohol or a drug, including illegal drugs. Because there is no consensus in the occupational health field as to what constitutes drug dependence, it is sufficient for a complainant merely to affirm drug dependency for a ground to be established.

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[9] See discussion in C. Trethewey, "Compulsory Drug-Testing and the Employee's Civil Rights" (1986), 3 Bus. & L. 89, at 90; and R. Solomon, *Employment Drug Testing and Employment Assistance Programs: Legal Rights, Obligations and Liabilities* (London, Ont.: 1988) (unpublished manuscript), at 20-21.

[10] Ontario Human Rights Commission, *Policy Statement on Drugs and Alcohol Testing* (November 1990), at 1.

[11] Canadian Human Rights Commission, *Policy 88-1[:] Drug Testing* (Ottawa: 1988), at 1.

b) Perceived Drug Dependence

> In the absence of compelling evidence to the contrary, when an individual is treated adversely as the result of a 'positive' test, it may be presumed that the employer perceived the individual as drug dependent.

It is essential to understand that the policy statements do not have the force of law and that actions taken on the basis of such policies can be challenged in court.[12]

The above analysis clearly applies to a case in which a particular employee has been required to submit to a drug or alcohol test (perhaps as a result of some triggering event such as an accident), tests positive, and loses his job or is otherwise denied a benefit. This could constitute a *prima facie* case of direct discrimination on grounds of actual or perceived handicap. The analysis would also apply to situations in which drug or alcohol testing is imposed equally on all employees or job applicants. This may be held to constitute constructive or adverse effect discrimination which the Supreme Court of Canada defines as follows:[13]

> [A]dverse effect discrimination ... arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force.... An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply.

Therefore, it could be argued that since the purpose of testing is to identify those employees who are or who have been dependent on drugs or alcohol, testing has the effect of discriminating against those who are identified by a prohibited ground of discrimination under section 5 of the *Code*, namely, discrimination on the basis of "handicap".

An issue that must be addressed is whether the definition of "handicap" encompasses a casual drug or alcohol user. It will clearly be very difficult to argue that a social drinker or a person who occasionally smokes marijuana has an illness. This individual will not generally be considered by his

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[12] K. Van Rensburg, "Mandatory Drug and Alcohol Testing" (1989), 6 Bus. & L. 9, at 10-11.

[13] *Ontario Human Rights Commission v. Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536, at 551, 23 D.L.R. (4th) 321, at 332. See J. Keene, *Human Rights in Ontario* (2nd ed.) (Scarborough, Ont.: Carswell, 1992), at 105. See, also, *Bhinder v. Canadian National Railway Co.*, [1985] 2 S.C.R. 561, 23 D.L.R. (4th) 481.

employer to have a perceived or actual addiction to or dependency on drugs or alcohol and thus will not likely fall within the ambit of the *Code*.[14] The ironic situation that results is that an employee who is a drug addict may be protected by the *Code* and may be able to argue that mandatory testing constitutes discrimination in employment, whereas a casual drug user who loses his job as a result of a positive urine test will likely not be able to successfully invoke the *Code*.

3. DEFENCES TO THE PROHIBITION AGAINST DISCRIMINATION

Despite the prohibition against discrimination on the grounds of handicap, there are defences available to an employer under the Ontario *Human Rights Code*.[15] An employer may attempt to justify a mandatory testing program on the grounds of two defences provided in the *Code*, namely, that the employee, because of his handicap, is incapable of performing the essential duties of his work, or that testing constitutes a *bona fide* occupational requirement.

(a) INCAPABLE OF PERFORMANCE

Section 17(1) of the Ontario *Human Rights Code*[16] provides:

> 17.-(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

In situations where an employer takes disciplinary measures against an employee for testing positive for drugs or alcohol, the issue that will have to be decided is whether test results are sufficient to establish that the employee is unable to perform the essential requirements of his work. In the Commission's view, management will not be able to justify the dismissal of an employee under section 17 of the *Code* solely on the basis that the employee tested positive for drugs on a urine or blood test, for example. As previously discussed, these tests do not measure impairment or the ability of an individual to perform his work. As the Canadian Human Rights

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[14] M. Pinsonneault, *Medical Examination and Testing in the Workplace* (Toronto: 1991) (thesis submitted in conformity with the requirements of the LL.M. Degree, Faculty of Law, University of Toronto), at 150.

[15] *Supra*, note 2.

[16] *Supra*, note 2.

Commission states, the link between testing positive and the capacity to do the job is tenuous:[17]

> 'Positive' testing has no direct correlation to job performance. Testing "positive" does not indicate impairment or dependency. In fact, it does not even reveal drug use.
>
> All a 'positive' test result reveals is that at some time, which may have been days or even weeks before the day of testing, the individual was exposed, once, to a drug.

Therefore, it will be necessary for the employer to adduce other evidence which demonstrates that the employee was incapable of executing his work in a competent manner. It is also essential to note that section 17(2) of the *Code* imposes a duty on the employer to accommodate the employee, which will be shortly discussed.

(b) *BONA FIDE* OCCUPATIONAL QUALIFICATION

The second circumstance in which management may assert that it is justified in imposing a mandatory testing program is where testing is a *bona fide* occupational requirement for the particular position. In the words of section 11(1)(a) of the Ontario *Human Rights Code*,[18] "the requirement, qualification or factor [must be] reasonable and *bona fide* in the circumstances".[19] The Supreme Court of Canada defines *bona fide* occupational requirement as follows:[20]

> To be a *bona fide* occupational qualification and requirement a limitation, ... must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.

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[17] *Supra*, note 11, at 2.

[18] *Supra*, note 2.

[19] It was stated by the Supreme Court of Canada in *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at 502, 72 D.L.R. (4th) 417, at 425, that *bona fide* occupational requirement and qualification are equivalent and co-extensive terms. See, also, discussion in Keene, *supra*, note 13, at 200-15.

[20] *Ontario Human Rights Commission v. The Borough of Etobicoke*, [1982] 1 S.C.R. 202, at 208, 132 D.L.R. (3d) 14, at 19-20. See L.E. Henriksson, "The Unconvincing Case for Drug Testing" (1991), 17 Can. Pub. Pol'y 183, at 191.

Applying the above principles to workplace testing, it would be incumbent on management to establish that it honestly believes that testing is necessary for the particular work and it was not introducing a testing program for extraneous purposes which violate the *Code*. In addition to this subjective element, it must be demonstrated on an objective basis that testing is reasonably necessary to ensure that employees in these positions perform their work without compromising their personal safety, the safety of co-workers or public safety. Management may be obliged to adduce scientific evidence in order to satisfy this requirement.[21]

An employer may argue that in "safety-sensitive positions" testing is reasonably necessary to ensure the proper performance of the job. For instance, management may assert that drug or alcohol testing of pilots, train engineers or truck drivers constitutes a *bona fide* occupational qualification. However, given current technology, it will be difficult to convince a board or a court that testing bodily fluids measures the ability of an employee to perform his work, as these tests cannot measure impairment.

A strong argument could be made that a court will be much more likely to accept performance testing, which essentially measures the motor coordination skills of the employee at the time the test is administered.[22] These tests are stated to be superior to the conventional testing methods for two reasons. First, the testing is less invasive than current testing techniques and second, performance testing actually establishes whether the employee is impaired or incapable of fulfilling the essential responsibilities of his work. In fact, the Canadian Human Rights Commission has clearly stated that drug testing should be prohibited if there are "less discriminatory ways of assessing the individual's capacity to perform the job".[23]

Both the Ontario[24] and the federal[25] human rights commissions have stated that in workplaces where alcohol and drug testing is conducted, it is essential that the testing is performed by qualified technicians in properly equipped laboratories. In addition, the employer is responsible for ensuring that the samples extracted from employees are properly labelled and protected at all times. Furthermore, to ensure confidentiality, personnel

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[21] *Ontario Human Rights Commission v. The Borough of Etobicoke*, *supra*, note 20. See, also, Van Rensburg, *supra*, note 12, at 11.

[22] This testing technique is discussed in fuller detail in ch. 7 of this Report.

[23] *Supra*, note 11, at 2.

[24] Ontario Human Rights Commission, *supra*, note 10, at 2.

[25] Canadian Human Rights Commission, *supra*, note 11.

information concerning an employee must "remain exclusively with the examining physician and away from the worker's personnel file".[26]

It is important to understand that before a judicial body, such as a Commission or court, will hold that mandatory testing is *reasonable* and *bona fide* in the particular circumstances, the following must be satisfied by management:

> 11.-(2) The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

We shall now examine the duty of accommodation imposed by the *Code* on an employer who seeks to introduce drug and alcohol testing.

(c) The Duty to Accommodate

A duty to accommodate employees is imposed in cases where management seeks to justify its testing program on the ground that the employee is incapable of performing the essential requirements of his work[27] or where an employer alleges that testing is a reasonable and *bona fide* occupational requirement.[28]

The Ontario Human Rights Commission is of the view that the best method of accommodating employees with a drug or alcohol addiction/dependency is for employers to establish employee assistance programs.[29] Accommodation may include transfer of the employee to another job in which the employee can safely perform the essential requirements of the work, or authorized leave from employment for the purpose of receiving medical treatment.[30] In the latter situation, the employee is entitled to receive the same benefits granted to workers who have other illnesses for which absence from work is necessary in order to seek medical treatment.

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[26] Ontario Human Rights Commission, *supra*, note 10, at 2.

[27] *Human Rights Code*, *supra*, note 2, s. 17.

[28] *Ibid.*, s. 11.

[29] *Supra*, note 10, at 3.

[30] Van Rensburg, *supra*, note 12, at 11.

An employer is relieved of the duty to accommodate, according to the *Code*, if accommodation will cause "undue hardship".[31] Factors such as the cost of accommodation, outside sources of funding, and the health and safety requirements of the position will be examined by a court in its determination of whether accommodation will cause "undue hardship" to the employer.[32] According to a policy statement of the Commission, management will be relieved of the duty to accommodate an alcohol or drug dependent/addicted employee if:[33]

1. the cost of the accommodation would affect the essence or viability of the enterprise;

2. notwithstanding accommodation efforts, health or safety risks to the public are still of such a serious degree that they outweigh the benefit of providing treatment to the worker with an addiction or dependency; or

3. the employee refuses to undertake any rehabilatory treatment.

In the situation where an employee participates in a rehabilitation program but is nevertheless not able to overcome his dependency or addiction, no further accommodation may be required of management.[34]

4. TESTING FOR DRUGS AND ALCOHOL AS PART OF EMPLOYMENT-RELATED MEDICAL EXAMINATIONS

The Ontario Human Rights Commission has formulated a policy on employment-related medical examinations which, it states, is applicable to drug and alcohol testing.[35] It stipulates that employment-related medical examinations or inquiries that are conducted as part of an applicant screening process are strictly prohibited.[36] Medical examinations are only permitted after a conditional offer has been made to the prospective employee. In addition, the medical examination is restricted to an assessment of whether the individual has the ability to perform the essential duties of the job.[37]

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[31] *Human Rights Code*, *supra*, note 2, s. 11(2).

[32] *Ibid.*, ss. 11(2), 11(3), 17(2) and 17(3).

[33] Ontario Human Rights Commission, *supra*, note 10, at 3.

[34] Canadian Human Rights Commission, *supra*, note 11, at 2.

[35] See *supra*, note 10, at 1; and Chapnik, *supra*, note 5, at 105.

[36] Ontario Human Rights Commission, *supra*, note 10, at 1. See *Human Rights Code*, *supra*, note 2, s. 23(2).

[37] Ontario Human Rights Commission, *supra*, note 10, at 1.

5. CONCLUSION

The Commission is of the view that the provisions in the Ontario *Human Rights Code*[38] do not adequately address the problems posed by workplace testing. Although an argument can be made that many testing programs currently imposed on workers constitute discrimination in employment, the *Code* will likely apply only to employees who have or are perceived to have a drug or alcohol addiction or dependency. In other words, the human rights legislation does not appear to have application to the casual user of drugs or alcohol. Furthermore, the *Code* does not address the significant privacy issues which emanate from testing the bodily fluids of employees.[39] It is also important to remember that the policy guidelines issued by the Ontario Human Rights Commission on drug and alcohol testing do not have the force of law and "are subject to interpretation by boards of inquiry and the courts".[40]

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[38] *Supra*, note 2.

[39] See Canadian Civil Liberties Association, submission to R. MacKenzie, Minister of Labour for Ontario, on Mandatory Drug Testing in the Workplace (February 21, 1992), at 5.

[40] *Supra*, note 10, at 3.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

It is time for the Ontario government to promulgate legislation that specifically addresses the issue of drug and alcohol testing in the workplace. As this Report illustrates, the current legal framework does not adequately deal with the complex problems posed by workplace testing. Statutory and common law rules do not provide sufficient protection to employees who are subjected to mandatory testing. For example, neither the *Employment Standards Act*[1] nor the *Labour Relations Act*[2] nor the *Occupational Health and Safety Act*[3] contain provisions that delineate the circumstances, if any, in which the testing of employees is permitted. As far as common law tortious and contractual actions are concerned, the remedies are likely to be unsatisfactory; the successful employee will not be reinstated and the damages may be minimal.[4] Furthermore, an employee may be reluctant to launch a lawsuit against his employer for defamation, battery or the intentional infliction of mental suffering, particularly given the uncertainty of the success of these actions. In terms of the arbitral jurisprudence, although Ontario arbitrators are beginning to articulate principles respecting the appropriateness of workplace testing, their awards only have an impact on the approximately thirty-two percent of the workforce who are unionized. Job applicants are in a more vulnerable position than current employees with respect to testing, as prospective employees are not entitled to submit a complaint to arbitration nor do they have any contractual recourse against management.

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[1] R.S.O. 1990, c. E.14.

[2] R.S.O. 1990, c. L.2.

[3] R.S.O. 1990, c. O.1.

[4] See, for example, the discussion in ch. 4 of this Report on wrongful dismissal actions. See, also, M. Wight, "State Drug Testing Statutes: Legislative Attempts to Balance Privacy and Productivity" (1989), 14 J. Corp. L. 721, at 740 and 753.

As the Report demonstrates, the Ontario *Human Rights Code*[5] does not adequately address the issue of workplace testing. The Canadian Civil Liberties Association is likewise of the opinion that:[6]

> [T]he [Ontario Human Rights] Code ... provides inadequate redress. There, the issue is whether the particular program involves discrimination on the basis of handicap.... [T]he issue of discrimination, while valid, is really beside the point. Universal and random urine tests represent a gratuitous invasion of privacy and dignity. That is the central issue.

Furthermore, although an employee may successfully convince a court that a testing program imposed by management violates section 7 or section 8 of the *Canadian Charter of Rights and Freedoms*,[7] section 32 precludes the application of *Charter* principles to a significant proportion of the Ontario workforce.[8]

The Commission takes the position that the testing legislation that is promulgated by the Ontario government ought to apply to private sector and public sector employees, to unionized as well as to non-unionized workers, and to job applicants and current employees. Statutory provisions specifically directed to workplace testing will substantially reduce the uncertainty that persists respecting the appropriateness of testing employees in this province. This in turn will reduce the costs associated with instituting labour arbitration grievances, human rights actions, constitutional challenges and other legal actions.

The Commission recommends that a legislative ban ought to exist on the testing of bodily samples of all current and prospective employees in Ontario. The Commission makes this recommendation for several reasons. First, the techniques currently used to analyze the bodily fluids of employees for substance abuse are incapable of detecting impairment. Aside from the legal and ethical issues that emanate from chemical testing, "testing does not tell you anything about the present physical or mental condition of the

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[5] R.S.O. 1990, c. H.19.

[6] Canadian Civil Liberties Association, submission to R. MacKenzie, Minister of Labour for Ontario, on Mandatory Drug Testing in the Workplace (February 21, 1992), at 5.

[7] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, c. 11 (U.K.) (hereinafter referred to as the "*Charter*").

[8] C. Trethewey, "Compulsory Drug-Testing and the Employee's Civil Rights" (1986), 3 Bus. & L. 89.

person tested" and thus bears no rational relation to employee performance.[9] As Imwinkelried states:[10]

> In short, today's drug-testing programs are founded on questionable assumptions. Employers who rely solely on immunoassay tests may be punishing workers who are guilty of no wrongdoing whatsoever. Those who bother to confirm positive immunoassay results, but who consider any trace of a drug-related metabolite a sure sign of guilt, may be punishing workers whose only offense was to attend the wrong party or sit in the wrong car. And even those who manage to demonstrate wilful ingestion of a drug may still lack anything approaching scientific proof that the employee was impaired at work.

The Canadian Civil Liberties Association[11] and the Canadian Bar Association-Ontario[12] have also taken the position that testing the bodily fluids of employees should be prohibited. In its submission to the Ontario Ministry of Labour on February 21, 1992, the Canadian Civil Liberties Association states:[13]

> In the opinion of the Canadian Civil Liberties Association, there is simply no excuse for employees or prospective employees in this province to be required, on a universal or random basis as a condition of employment, to share their urine with strangers. In the first place, such fluids are an intimate part of the body. In the second place, the need to ensure the integrity of a specimen could well lead to an insistence that the production of the specimen be witnessed. It is not hard to understand how urinary surveillance could be seen as an indignity. In the third place, urinalysis reveals a lot about a person's health and lifestyle but virtually nothing that is job-relevant.
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> The most that a positive test could reveal is some exposure to an impugned drug within the few days preceding the test. There is no reason to believe that more than a small minority of those in contact with such drugs have developed a dependency on them. Since tests cannot determine the amount involved, they cannot sustain even an educated guess as to the likelihood of past or current impairment. A drug test does not reveal whether there was intentional consumption or accidental exposure; it does not indicate whether the contact

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[9] S.J. Wisotsky, "The Ideology of Drug Testing" (1987), 11 Nova L. Rev. 763, at 764; K.W. Yeam, "Involuntary Random Post-Employment Drug Testing in the Public and Private Sectors" (1986), 20 Beverley Hills B.J. 168, at 170; S. Chapnik, "Mandatory Drug Testing In The Workplace" (1989), 5 Admin. L.J. 102, at 104; and E.M. Chen, P.T. Kim and J.M. True, "Common Law Privacy: A Limit on an Employer's Power to Test for Drugs" (1990), 12 Geo. Mason U.L. Rev. 651, at 692.

[10] E.J. Imwinkelried, "False Positive[:] Shoddy Drug Testing Is Jeopardizing the Jobs of Millions" (1987), 27 The Sciences 22, at 28.

[11] *Supra*, note 6, at 2.

[12] *Report of the Canadian Bar Association-Ontario, Committee to Study the Implications of Mandatory Drug Testing in the Workplace* (July 1987), at 4.

[13] *Supra*, note 6, at 2-3.

> occurred at work or at home, on the job or at play. There is no way to know from the test whether the subject is a frequent, addicted, occasional, or a rare user - if, indeed, it could be assumed that the subject is a user at all. Thus, the test cannot determine whether the contact produced impairment, enhancement, or anything relevant.

Another important reason to prohibit chemical testing in the workplace is that such testing constitutes a significant invasion of the privacy rights of employees in this province. In a recent publication entitled *Drug Testing: Legal Implications*, the Research Branch of the Library of Parliament makes the following statement:[14]

> As compulsory drug testing involves the taking of bodily substances, it constitutes the most intrusive infringement of the sanctity of the human body and thus the right to privacy.

As this Report emphasizes, chemical testing reveals confidential information respecting an individual's lifestyle that is unrelated to legitimate employer concerns. In the words of the federal Privacy Commissioner:[15]

> Testing supposes an employer's (or government agency's) right to exercise substantial control over individuals and to intrude into some of the deepest recesses of their lives. The technology of drug testing is being allowed to shape the limits of human privacy and dignity.
>
> The situation should be the other way around. Notions of respect for individual privacy and autonomy should place limits on the intrusions which technology will be permitted to make into personal lives. In other words, the uses of technology should not limit human rights; human rights should limit the uses of technology.

A further reason for a ban on drug testing is that there is no empirical evidence to support the proposition that drug abuse has become a significant problem in the Ontario workforce.[16] According to studies that have been conducted, drug use in Canada has not increased since the 1970s.[17] As

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[14] N. Holmes, Law and Government Division (Ottawa: April 20, 1990; rev'd January 2, 1992), at 1. The Research Branch of the Library of Parliament works exclusively for Parliament conducting research and providing information for Committees, members of the Senate and the House of Commons.

[15] Privacy Commissioner of Canada, *Drug Testing and Privacy* (Ottawa: 1990), at 20.

[16] According to B. H. Cunningham, Senior Program Consultant at the Addiction Research Foundation, alcohol and drug use in Ontario peaked in the late 1970s and has been stable or in decline since then: see "Substance Abuse – The Hidden Brain Drain", presentation on substance abuse in the workplace at Insight Seminar on *Drugs and Alcohol in the Workplace*[:] *Creating and Implementing Effective Corporate Policy* (Toronto: May 28, 1992); and "Jar Wars", editorial, *The Toronto Star* (September 25, 1990) A16.

[17] Chapnik, *supra*, note 9, at 103.

stated by the the federal Privacy Commissioner,[18] drug testing may be a "solution" to a problem that has been exaggerated. It is also noteworthy that it has not been demonstrated that improvements in safety, health or performance have occurred as a result of the millions of dollars expended on testing the bodily samples of employees in North America.[19] As the Addiction Research Foundationasserts, "[t]oo few studies have examined the impact of drug screening programs on industrial accidents and those that do exist lack scientific rigor".[20]

Although alcohol and other drugs have been targeted as threats to work performance, research in human physiology is calling attention to what may be a more imminent hazard – pervasive fatigue, caused predominantly by excessively long shifts or erratically scheduled work periods.[21] As Denenberg and Denenberg comment:[22]

> Environmental factors are often more convincing than drug test results as explanations for accidents or bad performance. Poor equipment or working conditions, as well as vague instructions, may more plausibly account for mishaps than the drug test evidence.

Nevertheless, workplace drug and alcohol testing programs are increasing and legislation is pending for mandatory screening of employees in federally regulated transportation companies.

In addition to the reasons articulated above, a convincing argument could be made that testing the bodily samples of employees violates section 7 and section 8 of the *Charter*. A further legal obstacle to the implementation of a mandatory testing program is the Ontario *Human Rights Code*.[23] In addition, a program that does not satisfy the principles articulated in such awards as *Re Canadian Pacific Ltd. and United Transportation Union*[24] and

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[18] *Supra*, note 15, at 19.

[19] L.E. Henriksson, "The Unconvincing Case for Drug Testing" (1991), 17 Can. Pub. Pol'y 184.

[20] Addiction Research Foundation, *Issues Related to Drug Screening in the Workplace* by S. Macdonald, S. Wells and R. Fry (March 1992) (draft manuscript), at 18.

[21] *Cornell/Smithers Report on Workplace Substance Abuse Policy* (Ithica, N.Y.: Smithers Institute, Cornell University, January 1992), vol. 1. See, also, A.A. Borovoy, "Stop Random Drug Tests", *Ottawa Citizen* (March 22, 1992).

[22] T.S. Denenberg and R.V. Denenberg, *Alcohol and Drugs: Issues in the Workplace* (2nd ed.) (Washington, D.C.: Bureau of National Affairs, Inc., March 26, 1990) (draft manuscript), ch. D, at 27.

[23] *Supra*, note 5.

[24] (1987), 31 L.A.C. (3d) 179 (Can.).

Re Provincial-American Truck Transporters and Teamsters Union, Local 880[25] will likely not be upheld by a labour arbitration board.

The Ontario Law Reform Commission is of the view that alternate measures can be introduced by management that do not involve the complex legal and ethical dilemmas posed by workplace drug and alcohol testing. It is our view that the following recommendations are more effective in addressing the concerns of management with respect to the safety of work performed by employees who have substance abuse problems and at the same time safeguard the privacy rights of employees.

Employers often eschew the effectiveness of traditional tools of supervision and behavioural evaluation in detecting early problems that may indicate alcohol or drug abuse.[26] An established method for identifying substance abuse problems is to monitor and evaluate the work performed by employees.[27] As the British Columbia Civil Liberties Association asserts, "[f]or the overwhelming majority of jobs, behavioral evidence of impairment is sufficient for the employer".[28] Similarly, Wisotsky is of the opinion that:[29]

> The way to measure performance is to measure performance. Rather than testing the typist's urine for drug traces, why not test the typing?

Thus, training supervisors to evaluate the work and behaviour of employees is an effective method of discerning substance abuse problems of members of the workforce.

Employee assistance programs (EAP) are also considered to be an extremely effective mechanism with which to combat drug and alcohol abuse in the workplace. An EAP is a cooperative effort between management and labour to solve drug, alcohol, stress and other problems affecting employees. It is built upon trust between labour and management.[30] An EAP may be

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[25] (1991), 18 L.A.C. (4th) 412 (Ont.).

[26] Chen, Kim and True, *supra*, note 9, at 690.

[27] Addication Research Foundation, *supra*, note 20, at 22.

[28] B. Beyerstein, M. Jackson and D. Beyerstein, *Drug Testing in the Workplace* (position paper of the British Columbia Civil Liberties Association) (1989), at 22.

[29] *Supra*, note 9, at 776.

[30] K.B. Zeese, "Drug Testing Here to Stay?" (1990), 12 Geo. Mason U. L. Rev. 545, at 550.

operated as a department within a company or it may be contracted out with an outside organization.[31]

EAPs are viewed as not only an efficient but also a cost-effective vehicle for addressing the addiction problems of employees.[32] Rehabilitation is often less costly than the expense of recruiting, hiring and training new employees. Furthermore, the success of EAPs in the rehabilitation of alcoholics as well as drug abusers is well documented.[33] As is stated in "Employee Assistance and Drug Testing: Fairness and Injustice in the Workplace," EAPs "are a proven and potent alternative for combating the drug hysteria currently sweeping the American workplace".[34] Denenberg and Denenberg, who also subscribe to the view that chemical surveillance ought to be replaced with closer supervision coupled with referral to an EAP when necessary, state:[35]

> Given the ample evidence that Employment Assistance Programs result in fewer accidents, absenteeism and medical costs, it is far from evident that chemical surveillance, coupled with punishment, is the only response to drug abuse or even the most effective one.

Both the Addiction Research Foundation[36] and the Ontario Human Rights Commission[37] highly endorse EAPs in addressing drug or alcohol addiction/dependency of employees. It is also interesting to note that many human resource experts believe that drug and alcohol testing actually undermines traditional workplace tools such as EAPs as testing destroys the

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[31] J.L. Goff, "Corporate Responsibilities to the Addicted Employee: A Look at Practical, Legal, and Ethical Issues" (1990), 41 Lab. L.J. 214, at 220; and A. Sanders, "Intoxication and the Law: Drug Testing in the Workplace", [1987] Ann. Surv. Am. L. 167, at 192.

[32] Goff, *supra*, note 31, at 216; T. Tremayne-Lloyd, "Drug and Alcohol Abuse in the Workplace – Transport Canada's Response" (1991), 8 Bus. & L. 20, at 22; and D.J. Morikawa, P.J. Hurtgen, T.G. Connor and J.J. Costello, "Implementation of Drug and Alcohol Testing in the Unionized Workplace" (1987), 11 Nova L. Rev. 653, at 656.

[33] Addiction Research Foundation, *supra*, note 20, at 22; M.R. O'Donnell, "Employee Drug Testing – Balancing the Interests in the Workplace: A Reasonable Suspicion Standard" (1988), 74 Va. L. Rev. 969, at 998; M.A. Rothstein, "Screening Workers for Drugs: A Legal and Ethical Framework" (1985-86), 11 Empl. Rel. L.J. 422, at 434; R.S. Schottenfeld, "Drug and Alcohol Testing in the Workplace – Objectives, Pitfalls, and Guidelines" (1989), 15 Am. J. Drug Alcohol Abuse 413, at 426; and J.T. Wrich, "Beyond Testing: Coping with Drugs at Work" (1988), 1 Harv. Bus. Rev. 120, at 124.

[34] W.J. Sonnenstuhl, H.M. Trice, W.J. Straudenmeir, Jr. and P. Steele, (1987), 11 Nova L. Rev. 709, at 728.

[35] *Supra*, note 22, ch. A, at 46.

[36] *Supra*, note 20, at 22.

[37] *Policy Statement on Drugs and Alcohol Testing* (November 1990), at 3.

trust between labour and management that is essential to the effectiveness of such programs.[38]

The Commission is of the view that behavioural evaluation of the impairment of employees in conjunction with employee assistance programs constitute very effective methods of detecting and rehabilitating workers who have substance abuse problems. However, the Commission takes the position that in jobs in which the *physical* safety of the employee, co-workers or the public is at risk, an impairment test may be imposed on the employee. For example, pilots, train engineers and individuals operating nuclear plants may be subjected to such a test. The Commission's endorsement of impairment or performance testing seeks to address the safety concerns of management and at the same time safeguard the privacy rights of employees.

Fitness or performance testing measures the psychomotor performance of employees. This type of testing, which takes the form of computer programs and other mechanical aptitude tests, evaluates the visual perception, fine-motor control and neuro-muscular response of employees. It is commonly accepted that safety-sensitive jobs or positions which have the greatest impact on the physical safety of the public involve the use of psychomotor skills.[39]

The Commission endorses performance testing for several reasons. First, in contrast to current testing techniques, such as urinalysis, blood or hair testing, performance testing actually measures impairment. In addition,

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[38] Chen, Kim and True, *supra*, note 9, at 690; Henriksson, *supra*, note 19, at 189; and Zeese, *supra*, note 30, at 550.

[39] M.G. McCourt, "Performance Testing Makes Sense", E.A.P. Digest (January/February 1992) 18.

A computer-based test designed to measure the psychomotor performance of employees in safety-sensitive positions is FACTOR 1000. Using a control knob, the employee must keep a randomly moving pointer centered between two boundary points on the computer screen. As the test proceeds, the movement of the pointer speeds up and becomes more difficult to control. When the individual's ability to compensate for the pointer's unstable movement is exceeded, the pointer carries beyond a boundary point which automatically ends the test. A sophisticated mathematical algorithm then calculates the individual's current hand-eye coordination. FACTOR 1000 compares the individual's current level of psychomotor coordination against his or her previously established baseline; it does not use a universal standard of measurement. However, it is fundamental to understand that the test has built-in safeguards which prevent an employee from establishing a baseline that is either too high or too low. It is also noteworthy that the cost for an employee to perform the test is less than one dollar, which is substantially less than the price of conducting a blood or urine test. Seaboard Transport, a trucking company which hauls oil and petroleum, is the first Canadian company to introduce FACTOR 1000 into its workplace. See McCourt, *ibid.*; "Seaboard Transport first to use computer to test impairment", *The Burnside News* (September 1991) 40; and J. Hamilton, "A Video Game That Tells If Employees Are Fit For Work", *Business Week* (June 3, 1991) 4.

performance testing detects impairment from *any* source, not simply drugs or alcohol, and thus "provides a much more sweeping safety check than a screen for a necessarily finite number of chemicals".[40] An employee who would be a safety hazard on any given day because of illness, lack of sleep, or personal stress will be identified.[41] Moreover, unlike chemical testing, performance testing provides immediate feedback – it gives supervisors a real assessment of the ability of the employee to perform his/her job on a particular day.[42] Unlike blood, urine and hair testing, the employer need not wait for laboratory results.[43] Thus, by identifying impaired employees *before* they begin their work, accidents, injuries and errors can be prevented, and the safety of the public and of other workers is enhanced.

A further reason for the Commission's endorsement of performance testing is that because this procedure does not involve the collection of bodily fluids, performance testing does not intrude upon an employee's "life-off-the job".[44] Thus, fitness or performance testing is likely to survive legal challenges under the *Charter* and *Human Rights Code*.[45]

Performance testing was developed in the 1960s and has been utilized by the National Aeronautics and Space Administration (NASA) to evaluate the manner in which astronauts function under environmental stress. The United States Air Force has also used the technique to measure a pilot's ability to control an unstable aircraft.[46] Likewise, some commercial pilots are tested on flight simulators which evaluate the pilot's driving skills, coordination, balance and reflex time.[47] As Zeese explains, not only does a flight simulator serve to prohibit drug-impaired pilots from flying, it also prevents pilots with any other type of impairment from operating an airplane.[48] It is also noteworthy that the American National Highway Safety Administration has used the test to detect fatigue and intoxication of truck

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[40] Denenberg and Denenberg, *supra*, note 22, ch. A, at 44.

[41] *Ibid.*, at 44-45.

[42] McCourt, *supra*, note 39.

[43] Many of the computer programs require less than one minute to conduct the test.

[44] Denenberg and Denenberg, *supra*, note 22, ch. A, at 44; W.K. Stevens, "Measuring Workplace Impairment", *The New York Times* (March 6, 1990) C1; "Video 'Game' May Aid Worker Safety – Computer System Answers Objections to Present Methods of Drug Testing", *The Seattle Times* (July 17, 1990) A2.

[45] *Supra*, note 5.

[46] McCourt, *supra*, note 39.

[47] Denenberg and Denenberg, *supra*, note 22, ch. A, at 44.

[48] K.B. Zeese, "Drug Hysteria Causing Use Of Useless Urine Tests" (1987), 11 Nova L. Rev. 815, at 822.

drivers.[49] Therefore, computer tests and other types of motor coordination tests have been useful in ascertaining whether or not an employee is fit to perform a "safety-sensitive" task. Both the Addiction Research Foundation and the Canadian Civil Liberties Association endorse computer software packages or mechanical aptitude tests that measure impairment of employees holding safety-sensitive positions.[50]

It is the view of the Commission that these recommendations recognize the legitimate interests of employers and the public in workplace safety and at the same time protect the privacy interests of employees who earn their livelihood in Ontario. Moreover, these proposals are likely to survive constitutional, human rights and other legal challenges.

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[49] McCourt, *supra*, note 39.

[50] Canadian Civil Liberties Association, *supra*, note 6, at 4; and Addiction Research Foundation, *supra*, note 20, at 22. The American Civil Liberties Association likewise endorses performance testing. See "From the Subway Smoke: Questions", (editorial) *The New York Times* (August 29, 1991), A28. See, also, Borovoy, *supra*, note 21.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

1. The provincial government should promulgate legislation relating to drug and alcohol testing in the workplace. The legislation should have application to private and public sector workers, to unionized and non-unionized employees and to job applicants.

2. A legislative ban should exist on drug and alcohol testing of bodily samples by employers of all current and prospective employees in Ontario.

3. In cases where impairment on the job poses a risk of physical injury or death to the employee, to co-workers, or to members of the public, performance testing of the employee is justified. Performance testing evaluates the psychomotor skills of employees by means of mechanical aptitude tests and computer programs. It is the most effective and least intrusive means of measuring impairment. The Commission is therefore of the view that even in the case of safety-sensitive positions, the taking of bodily samples is not justified.